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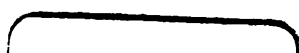


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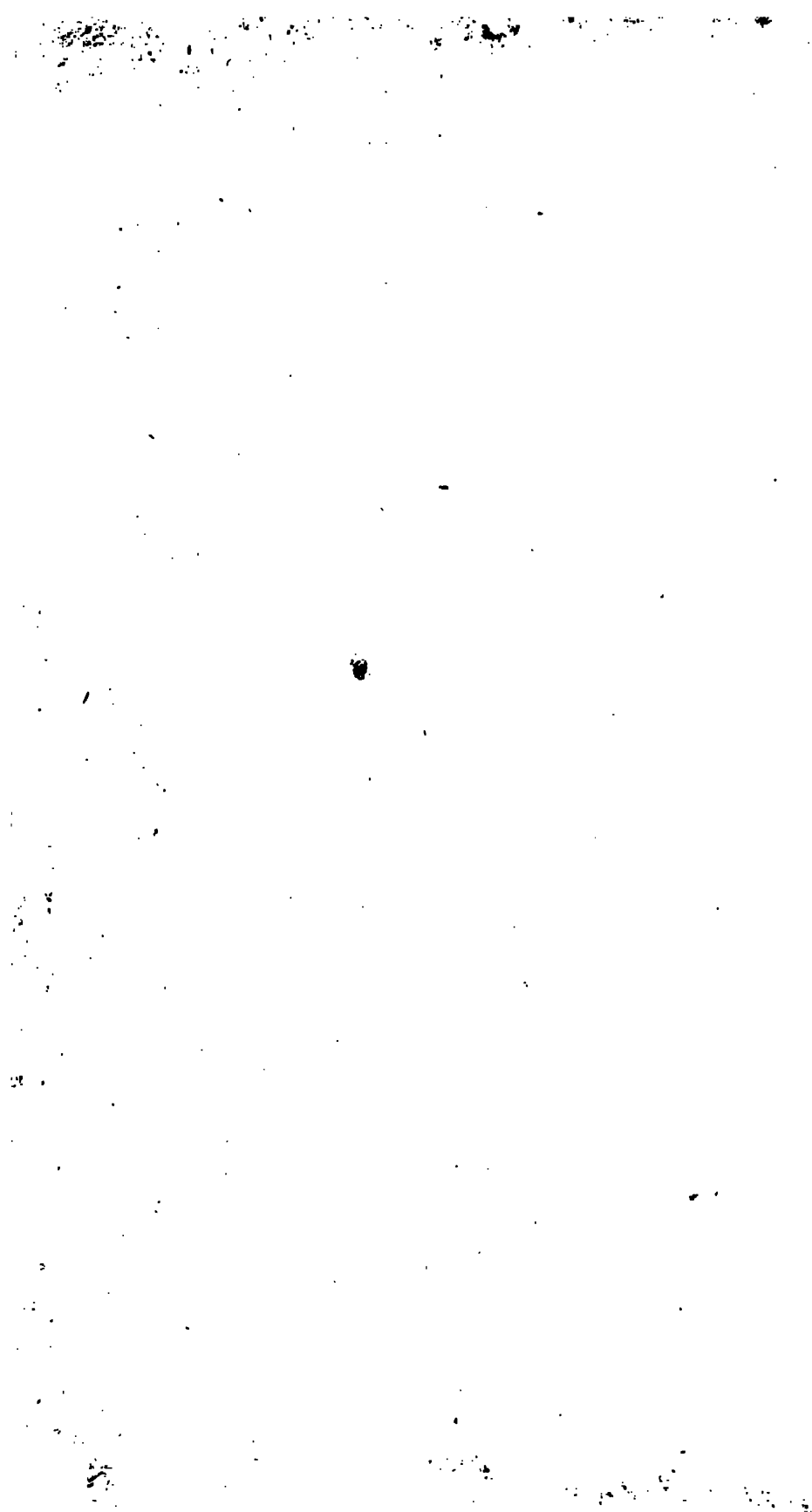
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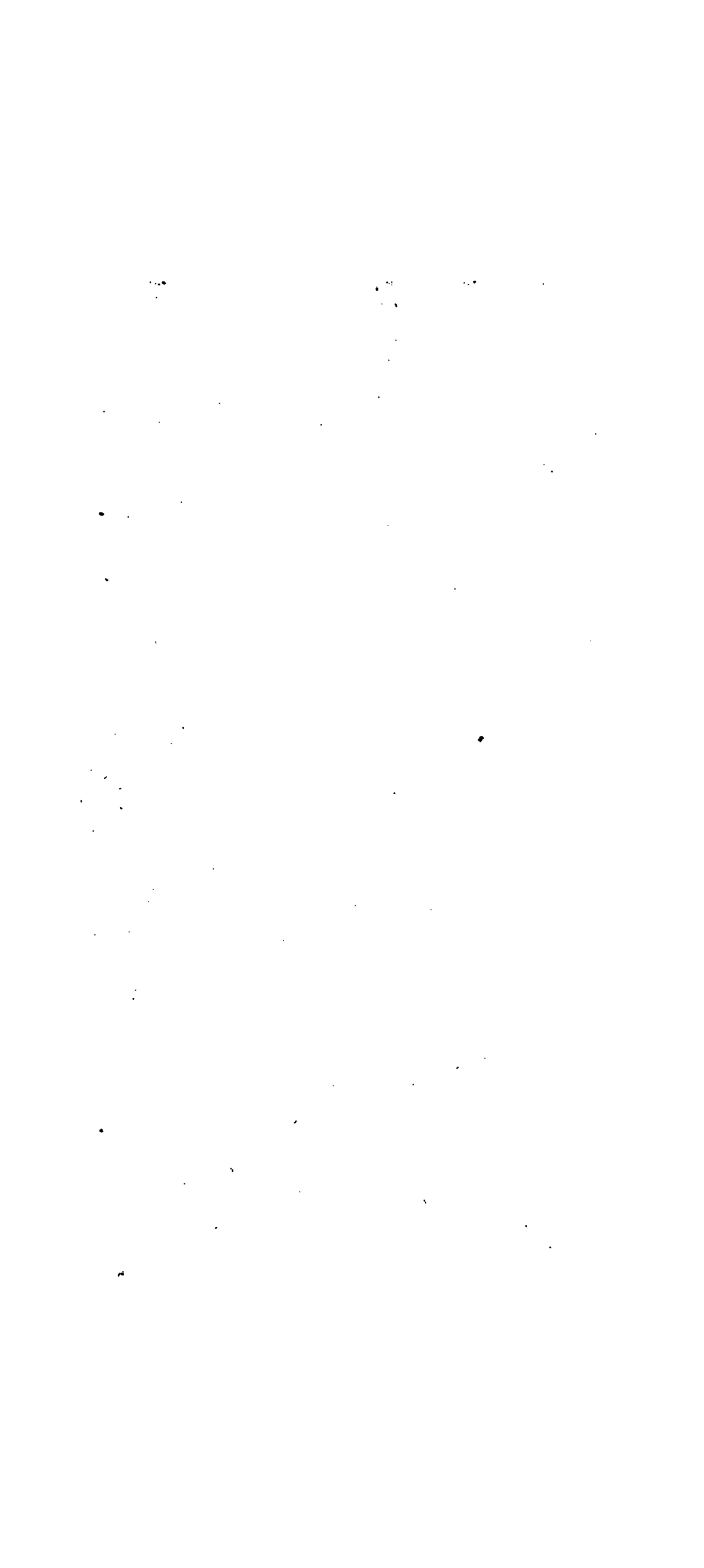
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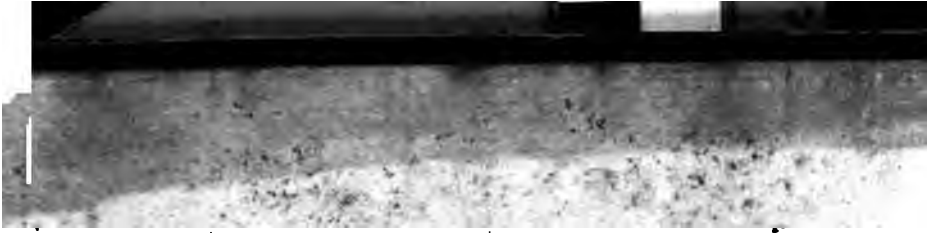


A
COLLECTION
OF
Acts and Records of Parliament,
WITH
Reports of Cases
ARGUED AND DETERMINED
IN THE
Courts of Law and Equity,
RESPECTING
T I T H E S.

By HENRY G WILLIM, Esq.
ONE OF HIS MAJESTY'S JUDGES
OF THE SUPREME COURT AT MADRAS.

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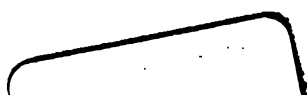






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small tithes, they will be still small. Hay is a great tithe; where there has been a modern culture, which makes that hay which was not so formerly, as foreign grafs, lucern, &c. a *modus* for tithe-hay covers it, because it is the same sort of thing now. A great difference has been made in small tithes with regard to culture, being formerly only used in gardens; yet, if there is a *modus* for all small tithes, the prescription cannot be thereby overturned. A *modus* is applicable to whatever small tithes shall arise. A *modus* in lieu of all small tithes whatever will cover hops as well as others: though you cannot prescribe in lieu of hops particularly, hops will pass under a grant *de minutis decimis*. An ancient grant of all small tithes would now carry any new-invented tithe. In *Franklyn* against *Jenkins*, one point was, whether a vicarage endowed before time of memory *de minutis decimis*, was entitled to tithe of hops, and so held. Next, how appears it on the evidence? the parol evidence to support it varies, is inaccurate and contradictory. Very few of the witnesses call it a *modus*; they that do, prove it directly contrary to the laying it; one calls it a rate; a rate and composition are the same. Lord *Talbot* has said, if the witnesses would not call it a *modus*, he would not. Then as to the receipts or written evidence, they are always expressly said to be for a *modus*, where there is one; but these, though varying in other respects, are for the tithe; and tithe and *modus* are opposite terms. The survey, 26 H. 8. read for the plaintiffs, is the best evidence; it is accurate, and proves, that the lands in *Romney* marsh were then only the value of 2 s. per acre. As to the precedent in the Exchequer, it appears, that the court would have held contrary, if the same matter had been laid before them, as is here. Until that time, and later, the Exchequer sent issues to try a *modus*, without first determining whether it was good in law, or not. This court has brought them to alter that, and also another practice of taking an account of tithes down to the time of the master's reports. It was there by *Page* and *Gilbert* directed to be tried, though *Price* held it in point of law a bad *modus*; and it was tried before *Eyre* J. who, upon this record in the time of H. 8. being read, held, that the commission should be produced, and that, if it was, he would certainly over-rule the *modus*. It is now settled by all the judges, that that is wrong. It is not necessary, especially at this distance of time, to produce the commission, and most of them are not in being. Your Lordship has allowed ministers accounts, and a survey, without producing the commission,

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and it would be strange to say, the parties are not to have the benefit of these surveys, because the commission is not to be found. Upon the equity reserved, where the validity of the *modus* only was argued (for the fact had been established) the court not only dismissed the bill with costs, as the plaintiff had failed on the trial, and no motion for a new trial, but also the cross-bill, with costs, which was an odd determination, decreeing neither way. They were not clearly of opinion, that it was a good *modus* on the face of it, but do not say it was bad. The parties plainly did not look on it as determined; for they brought new bills afterwards: but the rector, in his answer to the bill for establishment of the *modus*, not caring to engage further, agreed to accept the composition, but not to establish the *modus*. If then that had been a precedent in this very parish, it would not conclude his successor, because it was collusion; but being in a different parish, it can be no precedent to a *modus* in another: so that, as a precedent in fact, it will not bind; as a precedent in point of law, it was not determined; and the opinion of *Eyre J.* was, that if that could be proved, which is proved here from the augmentation-office, he would over-rule the *modus*.

Lord Chancellor.—Upon the reason of the thing, and the authorities that have been mentioned, and others which I will mention, I cannot determine this matter without a trial. The court certainly ought to support the rights of the church; and not to allow any *modus* or customary payment that by the rules of law is not to be supported. At the same time the court ought not, especially in cases of very extensive consequences, lightly to overturn and overthrow customary payments, that have prevailed for a great tract of years, which is commonly called time out of mind, or memory of man, though I do not mean strictly according to the notion of law before the time of the transportation of king *Richard* the first. I take it, that the question before the court in this case is of very extensive consequence, through a great tract of country. It appears in this case, and in former cases in *Westminster-hall*, that it extends and runs through several parishes in this country. When therefore that is the case, and no instance or tradition of payment of tithe in kind in this parish for a great tract of years, purchasers have come in and paid a price for the land according to those customary payments; and it would vary and alter the value of their property to overturn or overthrow them, which is a reason why these objections to them should be very well weighed and considered,

sidered, and that they should not be too lightly overturned, as has been done in some instances. 1754-

The plaintiff, upon his general right as rector, is certainly entitled to his demand of tithes in kind of these lands, if no bar is shewn; the defence insisted upon, is a *modus*; and undoubtedly, as against the right of the rector, it is incumbent on the defendant to maintain that *modus* in point of law and fact.

There are two general objections against allowing this *modus*, which are insisted upon as sufficient to over-rule it now. First, that it is not sufficiently proved in point of fact; the other, that if it was so, yet that is not good in point of law; which objection, in point of law, divides itself into two objections: the first, a general one, that the affirmative part of the *modus*, the payment of 9d. an acre, cannot have subsisted time out of mind; of which the court is bound to take notice; and that it cannot have subsisted time out of mind, from the alteration of the value of money, because 9d. an acre must be much above the value of the tithe of this land at the time this *modus* or composition must be supposed to commence; which the law of *England* by a pretty extraordinary law (and which I believe no other country does) makes from the transportation of *Richard* the first to the *Holy Land*: the other is an objection tending to the same thing, that this *modus* cannot have subsisted time out of mind, because there is an exemption of a product and culture, which was not made, and could not be used at the time it was supposed to commence; and that this exemption, being part of the agreement, must be coeval with the agreement itself, which shews it could not be an agreement time out of mind.

First, As to the proof of the *modus* in point of fact; as to which many observations are made on the part of the plaintiffs; and certainly, in cases of this kind, these observations have been frequently made, and have justly had weight; that there is a great variation in the proof; that none of the receipts call it a *modus*; only two of the witnesses call it so; the others say, there have been such payments for tithes generally; and one calls it a composition; and Lord *Talbot* has said, he would not call it a *modus*, if no witnesses would. If not one, that might be a material observation; but that, I am of opinion, is too slight an observation in general, that because these witnesses (who are *Lay Gents*) do not make use of a legal technical word, that customary payment shall be over-ruled. The question is upon the fact; the law makes the inference. Next, that the receipts do not call it a *modus*; and that they are very nice

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in taking receipts. Very often ministers will not call it a *modus* in the receipt, because they will not prejudice their successors, though they will give a receipt for the same, as usual; in very few instances will the rector submit to call it a *modus* in the receipt; and if he will not, the parishioners cannot compel him, but must submit, or pay without a receipt. And that sort of evidence is in some measure strengthened by a letter of the plaintiff's, in which he does not (and very rightly) call it a *modus*, but insists on this payment as the payment usually made for this land formerly, and upon an account and payment to be made upon that foot as the right he insisted upon; whereas he might have demanded an account and satisfaction for tithe in kind, if this was not a composition or *modus* that bound him. But as to all these observations, I should lay much more stress on them, if there was any evidence for the plaintiff, either of actual payment of tithe in kind, or of a tradition thereof for this marsh land, of which there is none, either of the fact of payment of tithe in kind, or any tradition from any ancient persons; which is proper evidence in cases of custom and usage. Then the positive proof on one side is strengthened by the weakness or want of positive proof (which implies a negative) on the other side. It is determining cases not on the merits, but according to the critical penning of depositions. The want of any evidence not only of payment of tithe in kind, but of any tradition, takes off the weight of the observation, that this might have commenced within a short space of time; for then some tradition would have been shewn that tithe in kind had been ever paid, or even insisted upon or demanded; but there is none. If therefore it rested on the proof, it is impossible to say, that a decree must be made for payment of tithe in kind, which as at present I cannot allow.

But the most strong objections are those, in point of law, arising from facts; but such facts as, it is insisted upon, the court is bound to take notice of. First, as to the exception of hops, which has something material in it; for hops are always allowed to have been introduced in modern times, that is, modern in respect of long antiquity. They began to be used and propagated in queen Elizabeth's time, and existed in this kingdom in Philip and Mary's time, and before; as appears from the statutes in the reign of Henry the eighth; therefore they were here: but here, as tobacco is here; planted for curiosity, and in small quantities; but they were in this kingdom to a certain degree before Elizabeth's time,

though *non constat* how far. Is it possible there should be such an exception in the beginning, or does the making this exception overturn the affirmative part of the *modus*? Suppose the agreement was to pay 9d. an acre for all small tithes of this land, except such small tithes as shall be afterward introduced; that would be certainly a good agreement. Then, instead of laying it in those general words, they have specified it with such a sort of product as these lands probably will be tithed with. But it is too much to lay such weight on this objection as to overturn this *modus*, when I see what has already passed. I allow that case of *Bate* in the Exchequer not to be such an authority as to bind in the present case; and it seems as odd a proceeding as I ever saw in a court of equity. Issues were first directed on both bills; and afterwards the trial was so had as not to determine the merits of the case, which the court expects after a trial; but it went off upon a nice objection in point of evidence, that the plaintiff in the original bill offered a record or survey in the time of *Henry* the eighth, (which now has been read), and which was over-ruled by the judge, and the merits were not entered into. Evidence is not to be destroyed, because some part of it is lost; for the law is not so unreasonable as not to suffer it to be supplied: but, upon its coming back upon the equity reserved, the court dismissed the bill without costs in law and equity, and dismissed the cross-bill with costs only in equity; the reason of which was, perhaps, that there was no application by the plaintiff *Bate* for a new trial, and as the verdict was against him, his bill was consequently to be dismissed, unless he prayed an account on the foot of the *modus*, which, I presume, he did not think fit to do; and I presume, the cross-bill was dismissed, because the court did not think the verdict, as found, was upon the merits, or sufficient to make a decree to establish the *modus*. But why it was dismissed with costs, I do not know, unless the court had a mind to set the costs on one side against those on the other. But afterward a bill is brought by the land-holder to establish this as a *modus*, and the defendant thereto by his answer says, he acquiesces to take the payment on that foot, but did not consent it should be established: yet the court did think fit to establish it as a *modus*. I believe I should hardly have done that. But however, it was only to establish it as between the then rector and parishioner; for that decree could not afterwards bind all the subsequent incumbents; because that must be on a *modus* established on proof, and on the mere right of the case, which was not entered

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into. The only use therefore I can make of that precedent, is this ; it is evidence to me of the opinion of a very learned court, when chief baron *Pengelly* (who was a very learned judge) presided there, that this inserting the exception in laying the *modus*, which was exactly just the same as in the present case, was not sufficient to impeach and overturn the *modus*, in point of law ; and as that is a very nice objection, and may be accounted for in different ways, and there being this opinion of that court, I shall be of opinion not to over-rule the *modus* upon that.

The more material objection is upon the affirmative part of the *modus* itself, whether it is not too rank. It is insisted upon as too high in point of value, and therefore that the court is bound to take notice of it, and ought to over-rule it. That doctrine has certainly prevailed in several cases, and I believe more strongly since the publication of bishop *Fleetwood's* book ; for, before that, I believe these things were not so commonly known. That objection, though founded in fact, is taken to be allowed by the court without a jury : that objection has been more commonly allowed as to the value of particular things, for which the *modus* has been set up ; as, where it is so much for a sheep, or lamb, or a particular kind of product, the value of which may be shewn at these times : but, it may differ as to a *modus* set up as to the value of lands, because several incidents and accidents may attend that ; the alteration of traffick or commerce, or of the culture of land, either improving or falling in value by accident, that makes such a *modus* more uncertain than in respect of the value of a particular kind of product, as calves, sheep, lambs, and things of that kind. Therefore, though this objection is taken in point of law for the judgement of the court ; the court does not always proceed as bound to determine it that way, but has considered it as a matter of fact proper for a jury. And this plaintiff has considered it as such, and has entered into proof of the fact, that is, by records, to shew the value of land in the time of *H. 8.* I cannot make a certain inference from thence. It is a material evidence to be sure ; and more light might have been had in that case of *Wareborn*, if justice *Eyre* had let that in. But when such commissioners are ever employed to make this valuation, I believe this valuation is never carried to the height ; and that in the time of *H. 8.* has been always thought not to be carried to the height. Compare it with valuations of modern times, as on the augmentation

tation of the queen's bounty, not valued at a third part: and yet I believe, they did not go stricter than in that of *H. 8.* I use this in this manner not to throw it off, only to shew this is not conclusive evidence. Then the question is, whether it is not fit for me to do, as the court of Exchequer did in the case of *Wareburn*, to direct an issue, and in that respect an inquiry to be made into that case of the rector of *Stoke*, which was first in the Exchequer, where *Giffard* brought his bill for tithe in kind, and particularly for tithe of lambs. The defendant there insisted, that neither he nor his predecessors were entitled to receive that, because of an ancient usage or custom in that parish, that every occupier having land paid 3 d. and no more, as a *modus*, in full satisfaction of the tithe of such lambs. The court did not determine it on the hearing, but directed a trial: but the plaintiff did not proceed to trial, and the court ordered the issue to be taken *pro confesso*, and afterwards ordered his bill to be dismissed. From that he appealed; and the reason given for his appeal (as appears from the case) was, that the court ought not to have directed an issue, but should have over-ruled this *modus* as too rank; because of the ancient price of cattle and other commodities, so that a lamb would not be worth formerly more than 6 d.: and that it was proved to be only a modern composition. The answer given to that is, that the ground for that objection seemed to be, that the *modus* was so great, and so near the value of tithable matters for which paid, that it must be a modern composition, considering the decrease of the value of coin: but that this objection, arising on matter of fact, was very proper to be considered by a jury. It was heard in 1735, at which I was not present, being then in the *King's Bench*: The lords affirmed the decree, and therefore affirmed, that sending it to an issue was proper and right. I sent to Mr. *Philip Ward*, son of lord chief baron *Ward*, (who has a very good repertory of cases in the Exchequer), to know what cases upon this head had been in the Exchequer; and the case of *Layfield* against *Delap* was sent to me; and also another, which comes up to the present, very like it, and in the same country, of *Grascomb* against *Jeffries*, 17th November 1687, which is before any of the cases that have been cited upon this head, and the account of it is this. It begins with saying, "This is a *Kentish* cause, and the plaintiff demanded tithe in kind for marsh-land; the defendant alleged a *modus* or custom time out of mind to pay 12 d.

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1754. *per acre for all marsh-land within the parish; in lieu of all tithes.* Proof was made of this payment forty or fifty years; and upon this, and as there was no proof of payment of tithe in kind, a trial was prayed to be directed; but the court denied the trial, and declared the pretended *modus* or custom to be void, as it was proved, the marsh-land was rented at so much an acre, that it was not possible, nor could a reasonable intendment be made, that the *modus* or custom time out of mind could be; and therefore the court over-ruled the *modus*, and said, that the court usually over-ruled a *modus* which seemed too great, and which did not seem reasonable to the value. But *nota*, (and for this I cite it) this cause was reheard, upon the defendant's motion, and the *modus* was sent to trial at law, by a *Middlesex* jury; but it does not appear what was done afterwards." The use I make of this case is to shew, that the taking this sort of objection, founded on the height of the sum, to be a matter of fact in some cases for the consideration of a jury, is not a new invention, nor first introduced in that case of *Giffard*, or that of *Bate*, but was done by the court in 1687, on great consideration; for it was twice before them: on the first hearing they were of a contrary opinion, and over-ruled the *modus*, upon the arguing it; but upon rehearing, and reconsidering, they reversed their own decree, and directed a trial. And I am of opinion, that in these kind of cases it is very fit to do so, and more so, in a case where it concerns the height of a *modus*, in respect of the value of land, than any other, especially of land which has been greatly improving or improved for several years. *Romney-marsh* is the first level which was banked in from the sea; and the laws of the sewers, and more modern laws, have a reference to that of *Romney*, and make that the rule. There is a possibility, where land was of little value at the time, but improving and inclosing, the parson, patron, and ordinary might come to an agreement to give from that time much more than the tithe was, in order to prevent the parson from demanding tithe in kind afterward, when the lands were greatly improved at their expence. It is like the case, where a commonage is inclosed at a great expence, and much more is by agreement given to the parson, than his tithe in kind at the present, because it is to prevent him from receiving tithe according to the improved value.

Therefore I will direct it to be tried; but the question is, where it is to be tried? According to *Grafcomb* against *Jeffries*, it is proper

per to try it in *London* or *Middlesex*. *Ramney-marsh* is very extensive, and hardly any gentleman in *Kent*, who has not an estate there; which I presume, was the reason of directing it in that manner in that case. If I had not found this precedent, I probably should not have thought so ill of my countrymen as to do it. Let it be tried in *London* upon an issue, whether the occupiers of the marsh land in this parish have paid, &c. just as it is laid in the answer: but the defendant in this court must be plaintiff at law, because the issue is upon him.

M. 29 Geo. II. A. D. 1755. In Canc.

Lamprey v. Rooke. [Ambl. 291.]

BILL for tithes of lands in the parish of *Stonar* in *Kent*. The defendant by her answer insisted, that the lands were part of the possessions of the monastery of *St. Austin*, one of the greater monasteries, and were discharged of tithes.

Where lands have been parcel of the possession of one of the greater houses, and have never paid tithes, a general allegation of discharge is sufficient.

Lord Chancellour was clearly of opinion, that if lands appear to have been part of the possessions of any of the greater monasteries which were dissolved by the statute of 31 H. 8. and there is no evidence of the payment of tithes for those lands at any time; courts will consider them as discharged by some way or other before the dissolution in the hands of the abbot, &c.; and that it is sufficient to allege that they were part of the possessions, &c. and were at the time of the dissolution by prescription, composition, or by other lawful ways and means, discharged from the payment of tithes.

H. 29 Geo. II. A. D. 1756. Scac.

Kirshaw v. Ifles. [MS.]

THE vicar of *Leeds* in the county of *York* brought his bill against several defendants for the tithes of agistment of turnips eaten on the ground by barren and unprofitable cattle, stating, that the defendants *Ifles* and *Hanson* were the occupiers of the land, and that the turnips were eaten either by their own barren cattle, or by those of the defendants *Thomson* and *Barker* and *Sherwood*, who having bought the turnips as growing, and eaten the same with their cattle, ought to pay tithes for the same, and to be considered as the occupiers of the land; and the bill charged, that the defendants

Agistment tithe of turnips payable by the occupier of the land, not by the owner of the beasts, agisted.

1756. defendants pretended no tithe was due, unless the turnips had been severed from the ground.

The defendants *Iles* and *Hanson* admitted the plaintiff's right to tithes, except to tithe-herbage and tithe of turnips eaten by cattle or sheep as herbage on the ground where they grew. They insisted, that tithe-herbage of turnips was a new claim, and they refused to pay tithes for the same; especially as they had let their turnips to the other defendants to be eaten off the ground by sheep and other cattle. The defendant *Iles* insisted on a *modus* of 16 d. an acre due to the impropriator in lieu of tithe-hay and of tithe-herbage of the same land; and that turnips eaten on the ground by cattle were of the nature of herbage, and covered by such *modus*, and not payable in kind to the impropriator or vicar.

The defendant *Hanson* insisted on a *modus* of 10s. a year for certain lands payable once in every six years to the impropriator in lieu of tithe-hay and herbage; and that the eatage of turnips was covered thereby.

They then both stated, that they agisted no cattle or sheep of their own; and therefore they submitted, whether those persons, to whom the turnips were let, were not the occupiers, and ought to pay the tithe, if any due, which they did not admit.

The defendants *Barker* and *Sherwood* said, that they were butchers, and had bought of the defendant *Hanson* several acres of turnips growing on his lands, which they eat on the ground with cattle and sheep, until they were eaten up, and no longer, which generally happened about *March*: that they did not believe, that by any law, custom, or usage, the occupier was obliged to pay tithe in kind of such turnips, or any satisfaction for the same; if otherwise, they submitted to the court, whether the tithe ought not to be paid by the occupier of the land whereon the turnips grew, and who sold the same.

The defendant *Thomson* said, that he bought of defendant *Hanson* the eatage of several acres of turnips, and paid him for the same; but that the said turnips were not eaten by his own cattle, but by those of another person, for whom he bought the same.

The cause was two days in hearing. The defendants objected to proceeding in the cause, because the impropriator was not a party; but the objection was over-ruled.

The court decreed the defendants *Hanson* and *Iles* to account with the plaintiff for the tithes demanded by the bill, with costs; and dismissed the bill as to *Barker* and *Sherwood*, with costs, to be paid

paid by the plaintiff, and the defendants *Iles* and *Hanson* to repay him the same. They dismissed the bill also as to *Thomson*, so far as related to the tithes in question with costs, to be repaid in the like manner: and as to such matters in *Thomson's* answer as were not required to be set forth by the bill, he was to pay the plaintiff his costs for the same.

1756.

Tr. 29 & 30 Geo. II. A. D. 1756. Scac.

Hele v. Bragg. [MS.]

BILL for agistment tithe generally. The defendant insisted, that none was due for cattle killed by him and spent in his family. On hearing, the bill for the said tithe was dismissed (n).

Tithe is not due for the agistment of cattle fed and killed by the occupier for the use of his family.

M. 30 Geo. II. A. D. 1756. Scac.

Yate v. Leigh. [MS.]

SEVERAL receipts for the payment of tithes were offered to be proved *vicâ voce*, and read as evidence. It was objected, that the receipts were not actually signed by Mr. *Barker*, the receiver, whose name appeared subscribed thereto, but by his deputy in his name. Upon debate the objection was allowed.

Receipts not signed by the receiver of the tithes himself, but by his deputy, are inadmissible in evidence.

P. 30 Geo. II. A. D. 1757. Scac.

Gills v. Horrex. [MS.]

THE defendant insisted on a *modus* of 4 d. for every acre of grass cut and made into hay in lieu of the tithe of hay, and brought a cross-bill against the rector to establish such *modus*. On the hearing it was objected that the *modus*, as laid, was illegal, inasmuch as it was not laid, "and so in proportion for a greater or less quantity than an acre." This objection was argued two several days, and the court took time to consider.

On a bill to establish a *modus* of 4 d. an acre for every acre of grass cut and made into hay in lieu of tithe-hay, it was adjudged that the *modus* was sufficient.

sufficiently set forth, though it did not state the 4 d. to be apportionable for a greater or less quantity than an acre.

(n) So, in the case of *Robinson v. Tunstall*, P. 1757. on a decree to account for tithes, the Deputy Remembrancer reported several sums due for the agistment of cattle fed and killed by the defendant for the use of his family. The defendant took exceptions to the report; and on arguing, the exceptions were allowed, and the Deputy Remembrancer was directed to review his report.

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So, though the defendant stated, that there were some lands in the parish on which the *modus* did not attach, and did not particularly set forth those lands, yet held well enough.

The court declared, that the *modus* was sufficiently set forth, and ordered a trial at law by a special jury. Upon the trial the *modus* was found, and afterwards established against the rector.

In the same cause the defendant stated, that there were several lands in the parish which were exempt from tithes, and there were other lands, whereof the rector was entitled only to a moiety of the tithes, and the above *modus* in lieu of tithe-hay was laid for every acre of grass, except on the lands which were tithe-free, and those for which tithes were paid in moieties. An objection was taken to the legality of this *modus*, because the defendant had not particularly set forth the lands, which he said were exempt, or for which tithes were due in moieties, which he ought to have done. But this objection was at the same time over-ruled.

M. 31 Geo. II. A. D. 1757. C. B.

Cheefeman v. Hoby. [Willes's Rep. 680.]

Where the right to tithes in kind is admitted, and a question arises between the rector and vicar to whom payable, such question is triable in the spiritual court, and the common law courts will not grant a prohibition.

THE opinion of the court was delivered as follows, by *Willes C.*
J.—A prohibition has been moved for to the consistory court of the bishop of *Lincoln*. *Hoby*, the lessee of the impropiators, the dean and chapter of *Lincoln*, had sued *Cheefeman*, who was an occupier of lands in *Burringham* in the parish of *Nottesford*, in that court for tithes of hemp and flax. *Cheefeman* by his plea there insisted, that the tithes were small tithes, and that these tithes or an uncertain composition have been time out of mind paid to the vicar; and he insisted likewise in his plea on an endowment of the vicar in 1310, and on an agreement in 1691 between the vicar and the parishioners. So the question to be tried in the spiritual court is not on a *modus*, (for it is admitted, that tithes in kind are due), but whether tithes in kind are to be paid to the vicar or the impropiator.

A great many cases were cited, and very properly: but, I shall only take notice of a few of them; because there are so many jarring cases on the head of prohibitions, that it is very difficult to reconcile them. For when the power of the church ran very high, the judges were cautious in granting prohibitions: when it did not run so very high, the judges ventured to go further in granting them.

I admit, that this suit is to be considered as between ecclesiastical persons; for *Cheefeman* insists on the right of the vicar, and *Hoby* claims under the right of the dean and chapter, who

who must be considered as ecclesiasticks, when they insist upon an ecclesiastical right. But the rule that has been laid down, that when both parties are ecclesiasticks, courts of law ought not to grant a prohibition, I do not at all rely on, because I think it a very absurd one and without the least colour of reason. For though one of the parties be a layman, if he do not insist on a *modus* or some other matter properly triable at common law, the court-christian must determine the matter, and a prohibition will not be granted: on the other hand, though both parties be ecclesiasticks, if either of them insist upon a deed or other matter properly triable at common law, a prohibition will certainly lie. What is said by lord *Coke* and *Hobart* and in several other books, that where a custom is insisted on contrary to common right a prohibition ought to go, does not at all affect the present case; because here, the common right, which is the payment of tithes, is admitted, and the question is only to whom they are payable.

But, we found our opinions on the judgement in the case of *Drake v. Taylor*, 1 *Str.* 87. and the reason which is given for it at the latter end of the case; for those given in the first part I think very weak ones. The case there is the same as this; for it is between a vicar and an occupier of lands who insisted on the right of a lay impropriator, and that the tithes claimed have time out of mind been paid to him. A prohibition was denied by the whole court (e); and the reason assigned at the latter end of the case is, that the custom there insisted on relating to a spiritual matter and not any temporal right, or in bar of any ecclesiastical right, ought to be tried in the spiritual court, because fifty years make a custom by the ecclesiastical law; and therefore if the courts of law were to judge of such a custom, they would judge by a wrong rule. And for this reason we refuse a prohibition in the present case.

If *Cheeseman* had insisted on a *modus* payable time out of mind to the vicar, a prohibition ought to go, because the spiritual court could not try the *modus*. But, as the right to tithes is admitted, and the only question is, whether they are to be paid to the rector or the vicar, we are of opinion, that the point in question is proper to be tried in the spiritual court. The endowment in 1310, and the memorandum in 1691, in respect to the present motion, are quite out of the case.

For these reasons we are all of opinion that the rule for a prohibition ought to be discharged.

(e) A prohibition had been before denied by the courts of Exchequer and Common Pleas.

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H. 31 Geo. II. A. D. 1758. B. R.

Rex v. Wakefield. [1 Burr. 485.]

A *certiorari* having issued to remove an order of justices made against Quakers under the statute of 1 Geo. II. c. 6. grounded on a positive but general affidavit that the defendants controverted the title to the tithes before the justices, and that the title to them was really in question; the writ was superseded, *quia improvidi emanavit*; the return taken off the file, and the order remanded, upon its appearing that this allegation and assertion had no other foundation than the general scruples of the defendants to pay demands of this nature.

MR. *Harrison* had obtained a rule in *Michaelmas* term 1755, to shew cause why an order of two justices made upon several Quakers for payment of tithes under the value of 10l. to the curate of a chapel, and confirmed at the sessions, upon an appeal from it, should not be quashed, together with the order of sessions confirming it.

Mr. *Norton* in *Michaelmas* term last, viz. on 26th November 1757, shewed cause. He gave up the order of sessions, as not maintainable; but defended the original order. To this original order, Mr. *Harrison* had taken four exceptions which were now supported by him and Mr. *Clayton*. The exceptions were as follows: It is a joint order made on different persons for distinct non-payments of different tithes: whereas there ought to have been a distinct order on each. In 1 *Str.* 471. between the parishes of *Chewton and Compton-Martin*, the removal of two different families of paupers by one order was holden bad, though the parishes were the same. 2dly, The title is in question: therefore the justices have no jurisdiction. The exception in the act of 1 Geo. II. c. 6. § 2. is, "unless the titles of such dues, tithes or payments shall be in question." And these words "unless, &c." extend to this whole clause, and are not confined to the granting of a *certiorari* only. And this fact of the title being in question, appeared, as Mr. *Harrison* alleged, upon the granting of the *certiorari* in the present case. 3dly, *Non constat* that the two justices who made this original order are "neither patrons nor interested in the tithes." But 1 Geo. c. 6. § 2. requires that they shall be neither one nor the other. Now they ought expressly to aver and shew negatively "that they are not;" else they have no jurisdiction by the very words of the act: the jurisdiction being given to "any two or more justices, &c. other than such as, &c." 4thly, It does not sufficiently ascertain and state what is due and payable by the defendants; or, at least, for what the respective sums are due. One sum, is 1 s. 6 d. "being due to the curate," not saying for what. Another is, "being the value of their ancient customary payments." Another is, 4 s. "being ancient customary payments."

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This order was made on the act of 1 Geo. fl. 2. c. 6. § 2. which extends the 7 & 8 W. 3. c. 34. § 4. to all payments to ministers or curates officiating in churches or chapels, the latter statute extending only to tithes and church-rates.

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Mr. Norton, *contra*, answered these objections. The substance of his defence against them was fully sufficient, if true: for he denied the first to be material, and the three last to be well founded.

The matter was adjourned to Monday 28th November. Then this motion being mentioned again the court inquired, whether the return of the *certiorari* was filed? And Lord Mansfield said, he had called for and read the affidavits for obtaining the *certiorari*; and upon the shewing cause, Mr. Justice Dennison mentioned a case of *Rex v. Furnes, B. R. H. 6 Geo.* upon a *certiorari* to remove an order made upon the act of 7 & 8 W. 3. c. 6. for payment of small tithes; where Lord Chief Justice Pratt thought, that where the right was in question, such cases were never intended to be the subject of that act of parliament. He said, this was only spoken from a note which he had seen, but it should seem to be right and true (p); and the rather, from a case of *Rex v. Furness* being mentioned in 1 Str. 264. where an order for non-payment of small tithes made on 7 & 8 W. 3. was quashed (q).

Lord Mansfield this term delivered the opinion of the court. He began with stating the two acts of 7 & 8 W. 3. c. 34. § 4. and 1 Geo. fl. 2. c. 6. § 2. (r) The former relates only to great and small tithes

(p) Sir James Burrow says, it is right and true: at least, he had a MS. note of the same case to the same effect, or stronger; for his note says, "*Per cur.* The design of the statute was only to give a speedy remedy for small tithes, where the right is agreed."

(q) The order according to that report was quashed, because said only *upon complaint* generally, and the 7 & 8 W. 3. requires the complaint to be *in writing*.

(r) This section is as follows.—"And whereas by an act made in the 7th year of the reign of king William the third, a remedy is provided for the recovery of tithes and church-rates, where any Quaker should refuse to pay the same: be it enacted by the authority aforesaid, that such remedy shall be and is hereby extended, and the like remedy shall and may be had and used against any Quaker or Quakers for the recovering of any tithes or rates, or any customary or other rights, dues, or payments, belonging to any church or chapel, which of right by law and custom ought to be paid for the stipend or maintenance of any minister or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place, other than such justice of the peace as is patron of any such church or chapel, or

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tithes and church-rates, and is temporary. The latter makes it perpetual, and extends it to "any tithes or rates, or any customary or other rights, dues, and payments belonging to any church or chapel, which of right by law and custom ought to be paid for the stipend or maintenance of any minister or curate officiating in any church or chapel." And both acts direct, "that the proceedings shall not be removed into any court, unless the title shall be in question." It is upon the last act that the present order was made. A *certiorari* has issued to remove the order into this court, and it came on upon exceptions to the order. Both sides made very material objections—one side, to the order; for that the justices had no jurisdiction, because the title was in question: the other, to the *certiorari*; for that no *certiorari* could issue by the express provisions of the act to remove the proceedings from before the justices into any other court, because the title was not in question.

The act was made in favour to, and for the ease and benefit of Quakers, and to save them from troublesome and expensive prosecutions: but it never meant that a mere scruple of theirs, or an obstinate with-holding of the tithes, should be any hindrance to the matter being determined by the justices of peace. This would have frustrated the very intention of the act, which meant to give this jurisdiction to justices in that very case; where the real right and title to them should not be in dispute between the parties.

Here his Lordship directed the affidavits on which the *certiorari* was granted to be read. It was therein sworn on the part of the defendants, "that the defendants controverted the title to the

"any ways interested in the said tithes, upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or any churchwarden or chapelwarden, or other person, who ought to have, receive, or collect any such tithes, rates, dues, or payments, as aforesaid, are hereby authorized and required to summon, in writing, under their hands and seals, by reasonable warning, such Quaker or Quakers against whom such complaint shall be made, and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein, as in the said act is limited or directed; and also to order such costs and charges as they shall think reasonable, not exceeding 10 s. as upon the merits of the cause shall appear just; which order shall and may be so executed, and on such appeal may be reversed or affirmed by the General Quarter Sessions of the county or place, with such costs and remedy for the same, and shall not be removed into any other court, unless the titles of such tithes, dues, or payments, shall be in question, in like manner as in and by the said act is limited and provided."

"tithes

“ tithes before the justices ;” and also, “ that the title to the tithes
“ was then and at the time of making the said affidavit really in
“ question.” 1758.

The justices had notice to shew cause against the *certiorari*. On shewing such cause, five old inhabitants of the chapelry swear by their affidavit, “ that such customary stipends or payments have
“ always been paid to the curate by the land-holders, without any
“ sort of scruple or objection, except lately by the Quakers ;” and no other persons dispute it. And these five persons also swear, “ that they believe them to be due ; and that the former owners of
“ these very lands, which had been purchased about four years ago
“ by these Quakers, did pay for them, as other persons did in the
“ said chapelry ;” and these Quakers purchased the lands as subject to such payments.

These are the affidavits upon which the *certiorari* was granted. Now, if this general allegation “ of the Quakers contravening
“ the title,” and the consequential assertion, “ that the title was in
“ question,” without any further particulars, or shewing at all upon what foot they controverted the payment, should be esteemed a sufficient ground for removing the orders, it would put a total end to these acts of parliament, and evade the very design and intention of making them. For the Quakers might pretend, that they are obliged in conscience to refuse or controvert the payment of these demands, and, consequently, to question and deny the right to receive them. Now that is the very thing the acts meant to provide a summary remedy for. The intention was, that in such case the justices should make an order to compel them to pay. Their affidavits are general, “ that they controverted the title, and that it was really in question.” Whereas by the affidavits made by the five old inhabitants it is very plain, that the former owners of these very lands have always paid ; and that these Quakers, who are the subject of this order, have no pretence to dispute it, upon any other foot than their own general scruple to pay any demand of this nature ; which these acts are, for their own ease and advantage, calculated to compel them to do, in a method the most gentle and convenient for themselves, who scruple to pay without compulsion.

We are all of opinion, as to the merits of the case, that the title is not so controverted, or so in question, as that the justices can be precluded from jurisdiction, or their order be regularly and

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His Lordship added this hint, to be observed in future cases of this sort; *viz.* that upon all orders of this kind, the great and material point must be, whether the title to the tithes was really in question or not; and ought to be determined before the *certiorari* issues.

P. 31 Geo. II. A. D. 1758. Scac.

Hawkins v. Harkness. [MS.]

Where defendant insists on a tender, and the plaintiff on the hearing is not able to surcharge, his bill, except as to the sum tendered, will be dismissed with costs.

TO a bill for tithes, the defendant insisted on a tender of 1 l. 16 s. before it was sued. The cause went on to a hearing, when the plaintiff being unable to surcharge the defendant, the court decreed the defendant to pay the 1 l. 16 s. and dismissed the bill with costs.

bill, except as to the sum tendered, will be dismissed with costs.

Tr. 31 & 32 Geo. II. A. D. 1758.

Hotham v. Foster. [MS.]

TO a vicar's bill for tithes, the defendant insisted, that his farm and lands had been always holden and occupied free from payment of all tithes, the same being the demesne lands of the crown, and held by the king and his predecessors, kings of *England*, in right of the crown, and that they had not been granted, demised, or alienated therefrom, save for short terms of years: he therefore insisted, that as his majesty and all his predecessors, and his and their tenants and farmers of the said lands, had for time beyond memory down to the present time holden and enjoyed the same free from the payment of all tithes whatever, his majesty was still entitled, and the defendant, as occupier, is still entitled to hold the same so free and discharged, as fully and effectually as if the same had been in the proper hands of his majesty. He denied that any tithe had ever been paid to the vicar, and knew of no other cause of exemption. Decree to account for the value of the tithes.

M. 32 Geo. II. A. D. 1758. In Canc.

Fenwicke v. Lambe. [Ambl. 365.]

BILL by the plaintiff, as vicar of *Bolan* in *Northumberland*, for an account and satisfaction of tithe-hay in the township or hamlet of *Shortflat* within that parish for the year 1755, to which he made claim under an endowment.

A *modus* of a *fother* of hay is void for uncertainty.

The defendants in their answer insisted upon a *modus*, that the occupiers of a part of *Shortflat-bog*, lying within the said hamlet, called *The Parson's Bounds*, have time out of mind and ought annually to cut, win, and make into hay of the grafs growing thereon two fothers, and carry the same at their own expence to the vicarage-house, in satisfaction for tithe-hay of the whole township or hamlet, and that the same hath been and ought to be accepted as such; and that a fother is a certain determinate quantity well known in those parts.

It was proved by the plaintiff's witnesses, and not contradicted by any on the part of the defendants, that *Shortflat-bog* is the worst part of the township, and that the *Parson's Bounds* is the

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worst part of *Shortflat-bog*; that it is a wet, swampy, uncultivated piece of ground, and that it produces only rushes or sedges, or at most, but a very little grafs; that the produce of it is only fit to cover houses and ricks: and it was proved by the witnesses on both sides, that a fother is as much as can be drawn in a long wain by two oxen and two horses. There was no evidence of tithes in kind having ever been taken for this hamlet, but on the contrary it was proved by the defendant that this *modus* had always been accepted.

Several objections were taken to the *modus* by *Sewell* and *Ambler*: 1st, As unreasonable, with respect to the occupier, upon the face of it: 2d, Unreasonable, upon uncontroverted evidence, with respect to the vicar: 3d, Uncertain.

As to the first, it was argued, that it was unreasonable for the occupier of this small part to pay tithes for the whole township. As to the second, that the vicar, in fact, hath nothing but rushes and sedges in lieu of tithes. That, as a *modus* on the one hand may be too rank; so, on the other hand, if it appear to be worth nothing, it is void. As to the third, that the fother, as described by the witnesses, is too uncertain. The quantity of hay depends on the condition of the soil, on the weather, on the goodness of the oxen and horses, and on the will of the occupier, who may take the opportunity to carry it in wet weather, when the bog is scarcely passable.

On the other side it was argued by *Perrott* and *Browning*, as to the first objection, that it was not unreasonable; for the court will suppose the whole township in possession of one owner at the time of the agreement supposed by the *modus*, who might lay the whole burthen upon this part. It might be worth the vicar's while to accept it. The tenant rents it accordingly; the purchaser buys it *cum onere*. As to the second, it might have been very good land at the time of the agreement, perhaps better than any other in the township. Any alteration since is not to be regarded. The other parts may have been improved, perhaps, because clear of tithes. As to the third, that it was certain enough. Tithes are affected by weather. If the horses are not good, it is a fraud on the vicar, and an action will lie. As certain as a hoard of apples, or a bushel of corn, which is different in different places, and is more or less according to the market to which it is carried.

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Sir Thomas Clarke, Master of the Rolls, was of opinion, that it was reasonable enough, but not sufficiently certain, for the reasons given at the bar ; and decreed an account.

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Tr. 32 & 33 Geo. II. A. D. 1759. Scac.

Berners v. Hillett, Clerk. [MS.]

ON a trial at law the *modus* was found, and the bill dismissed with costs. Then the defendant brought a bill against the rector to establish the *modus*, and he by answer submitting thereto, the court established the same, and ordered the plaintiff to pay the defendant the rector his costs of the second suit.

On a bill to establish a *modus*, the defendant is entitled to his costs, if he admits the *modus*.

Tr. 32 & 33 Geo. II. A. D. 1759. Scac.

Thomas v. Price.

BILL by the vicar of *Cadoxton* near *Neath* in the county of *Glamorgan*, for the tithe of the toll of corn ground at water-corn grist-mills, stating, that the defendants refused to account for the tithe, under a pretence that the mills were erected on lands which heretofore belonged to a religious house exempt from the payment of tithes: but the plaintiff insisted, that the erection of new mills on abbey-lands which were exempted from the payment of tithes, would not exempt such new mills from the payment of tithe of toll: that the defendants also pretended, that there was heretofore an ancient mill in the said parish, which was exempt from the payment of tithes, and which through length of time was decayed and taken down, and that the said new mills were erected in the same place with the old materials; and that therefore no tithe was by law due for the same: but the plaintiff charged, that the said new mills were erected on a part of the parish where no ancient mill ever stood, and on a new channel or current of water, which had been diverted from its ancient course into a new course for the private purposes of the owner of the soil.

Mills when and how tithable.

The defendant *Williams* admitted, that the plaintiff was vicar of the parish, and entitled to all small and vicarial tithes yearly arising therein, or to some pecuniary satisfaction in lieu thereof; but whether he was entitled to the tithe of the toll arising from all mills, and

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mill; and that no tithes whatever are due by any right, usage, or custom within the parish, from any rents paid to them as landlords; and that the same so paid to them ought to be esteemed as an annual expence issuing from the profits of the mill; and that if any tithe is due from the said mill to the plaintiff, it is due from the miller who occupies the same as a personal tithe only, to be paid out of the neat profits made by the miller after all deductions whatsoever; and therefore he was not, as landlord, obliged to set forth the corn, grain, or malt paid or delivered by the said respective millers, but that the plaintiff should resort for satisfaction therein to the respective millers who were the occupiers thereof. He further said, that if the new-erected mills should, notwithstanding their having been erected with part of the same materials, and on the stream of the same brook as the ancient mill, and on land exempt from the payment of tithes, be subject and liable to the payment of tithes, yet that no tithe ought to be paid by new erected mills until such time as they had fully cleared the expence of building the same; and that the same tithe, if any was due thereon, should be paid as a personal tithe by the occupier resident in the parish: and he averred, that he had never resided there, but in the town of *Neath*; and that he was in no other manner concerned in the said mills than as landlord to two third parts thereof.

The defendant *M. Price*, as lessee of the other third part of the said mills, put in the like answer, except that he further said that he did not live in the parish till the year 1753; and that he had yearly since that time paid to the plaintiff one guinea, which he had accepted in lieu of all his, the said defendant's, vicarial tithes in the said parish; and insisted, that he was not liable to any personal tithe whatever arising within the said parish until that year, when he came to dwell therein.

The other defendants, who were tenants and servants to the other defendants, put in the like answers; and insisted that no tithe was due from them till the mills had fully cleared all charges and expences laid out in the erecting thereof; that if there was any tithe due for the toll of the said mills, it was either to be esteemed a predial tithe, and due to the impropriate rector of the parish of *Cadoxton*, or a personal tithe, and of right due to the rector or vicar of the parish where the defendants inhabited and dwelt during the time they rented and occupied the said mills.

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1759. The plaintiff replied to all the answers, except that of the defendant *W. Thomas*; the defendants rejoined; and witnesses were examined on both sides; and upon hearing counsel, the defendant's counsel objected, that *G. Rice*, one of the owners of the mill, was not a party before the court in this cause; but on hearing the plaintiff's counsel thereupon, the court over-ruled the objection.

And on reading the depositions taken on the plaintiff's behalf; and the answer of the defendant *Williams*; and on debate of the matter; the court declared, that the plaintiff was entitled to the tithe of the toll of the said new-erected mill in the nature of a personal tithe only, that is to say, the tenth part of the clear profits arising from corn, grain, and malt ground in the said mill, over and above all incident charges; and thereupon ordered the several defendants severally to account with the plaintiff for the tithe of the profits of the mill, after an allowance of all incident charges, and pay the same to the plaintiff, with his costs of suit to be taxed; and the bill to be dismissed as against *W. Thomas* the servant, with 40 s. costs, to be paid over to the plaintiff by the other defendants.

On the 15th of *November 1762*, the defendants counsel prayed time to file exceptions to the report; and the hearing being adjourned, the defendants filed exceptions accordingly; but on the 25th of *November 1762*, upon hearing counsel, and reading the decree, report, and exceptions, the court ordered the exceptions to be over-ruled; the report to be ratified and confirmed; and the defendants to pay their several shares reported due, in the proportion in the said report mentioned, for the tithes of the profits of the said mill, with subsequent costs,

H. 33 Geo. II. A. D. 1760. In Cane.

Sims v. Bennett and others (s).

Whether a
tithe is great
or small is
determined
by the na-
ture of it,
not by its
locality. 3

THE bill in this cause was filed by the plaintiff as vicar of the parish of *Eastham* in the county of *Essex*, against the defendants, *Bennett* and *Johnson*, as occupiers of land within the parish, and against the defendants *Wilkes* and his wife, and *Hitch*,

Burn's E. L. 436. S. C.

(s) I am indebted for the report of this case, and that of *Sanfom* and *Shaw*, (*supra*) to the liberality and politeness of Mr. Justice *Buller*.

as claiming the rectory impropriate of the parish. And the end of the bill was, that the defendants *Bennett* and *Johnson* might account with the plaintiff, and make him satisfaction, for the tithes of all beans and peas sown by them in several parcels of land within the parish, and which they had from time to time, and in *July* and *August* then last gathered, or caused to be gathered, by the hand, in the field, by plucking them from the stalk whilst green, and which they had sent to several markets, and there sold for the food of man; and against the other defendants to set forth what right or title they claim to those tithes.

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For these purposes, the bill charged that in 1756 the plaintiff was instituted and inducted into the vicarage, and thereby became entitled under an ancient endowment to all tithes in the parish, except tithes of sheaved corn and hay, expressed in latin by the words *decimæ garbarum et fæni*.

That in the year 1309, *Ralph de Baldock*, bishop of *London*, at the instance, and in consideration of the poverty, of the then abbot and convent of the monastery of *Stratford Langthorne* in the said parish, and with the consent and approbation of the then chapter of the episcopal see of *London*, did, by deed dated the 9th of *April* 1309, 2 E. 2. appropriate the said rectory to the said abbot and convent and their successors, and did thereby endow the vicar of the said parish of *Eastham* for the time being thenceforth for ever with all tithes arising within the said parish *præter decimas garbarum et fæni*, and also with a certain pension of five marks to be paid yearly by the said abbot and convent and their successors to the vicars of the said parish for the time being out of the said excepted tithes.

The bill then set forth the instrument of appropriation and endowment in the words thereof; which, after reciting the poverty of the convent, appears to be as follows: *De consilio et assensu capituli ecclesiæ nostræ vobis donamus, concedimus, et autoritate pontificali tenere præsentium, charitatis intuitu appropriamus in usus proprios imperpetuum possidendum; salvâ inde congruâ portione ad sustentationem perpetui vicarii in eadem ecclesiâ ministraturi quem sic ordinare ducimus et tuxare, Imprimis, viz. ordinamus, quòd vicarius, qui pro tempore erit, ibidem mansum habeat, quem cæteri vicarii ultimis retroactis temporibus habere consueverunt. Et quòd idem vicarius habeat et percipiat decimas hortorum et curtilagiorum ac omnimodas decimas, præter decimas garbarum et feni et molendini adventum. Et præter hoc ordinamus, quòd idem vicarius singulis annis habeat et percipiat a vobis, abbate et conventu, in festis Sancti Michaelis et Paschæ per æquales*

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æquales portiones quinque marcas legalium sterlingor de prediis decimis garbarum. The instrument then only reserves to the bishop of London and his chapter the gift and nomination to the vicarage as often as the same should become vacant.

The bill then stated, that in the reign of *H. 8.* the estates and possessions of the abbot and convent, upon the dissolution of the monastery, were, by act of parliament, vested in the crown; and that the king afterwards by letters patent made a grant of the rectory, under which grant the rectory is now claimed as impropriate by the defendants *Wilkes* and his wife,

That the defendants *Bennett* and *Johnson* have occupied and enjoyed several parcels of land within the parish, and that in the year 1756 and in other subsequent years, they have planted and sowed such land with several quantities of beans and peas, and from time to time gathered the same by hand in the field by plucking them from the stalk whilst green, and sent the same to several markets, and there sold the same for the food of man, without paying the plaintiff tithes thereof, or making him any satisfaction for the same; and the bill charges, that such tithes have always been considered as small tithes and belonging to the vicar of the said parish, and not only so, but that, as vicar as aforesaid, the plaintiff is entitled to the tithes of beans and peas gathered green by virtue of the said endowment, and that by virtue of such endowment all manner of tithes yearly growing, arising, or renewing in the said parish, except the tithes of corn and grain, belong to and were thereby duly and properly granted to the vicar for the time being; and the bill therefore prayed an account and satisfaction for these tithes.

The defendants, *Bennett* and *Johnson*, by their answer admitted, that they had sowed several acres in the parish with beans and peas, and that they had gathered and sold the same green; but said, that the tithes of all beans and peas, whether gathered green or otherwise, having been always paid to the rector, and esteemed to belong to him, they had therefore from time to time compounded with the defendants *Wilkes* and his wife, as she is the impropriatrix of the rectory, and hoped they should not be again compelled to account with the plaintiff, as vicar, for these tithes, and submitted the right to the judgement of the court.

The defendants *Wilkes* and his wife by their answer claimed the rectory impropriate during the life of Mrs. *Wilkes*, and the defendant *Hitch* claimed the same in reversion after her death. And these defendants by their answer insisted, that beans and peas cultivated

tivated in the fields by the plough, wherever the same, when ripe, are gathered into barns, or gathered by the hand from the stalk, when green, are to be considered as great tithes, and belonging to the impropriator, and ought not to be looked upon as small tithes, or as belonging to the vicar; and said, they believed that neither the plaintiff, nor any vicar of the parish, ever received any tithe of beans or peas, but that such tithes have always been taken by the impropriator.

Upon the evidence it appeared from many witnesses, and some very old ones, that for at least 40 or 50 years last past, beans and peas had been cultivated in the fields or grounds of the parish, and that the same had been gathered and sold green; and many witnesses proved, that the tithes thereof had always been paid or compounded for to the impropriator; and no instance at all was shewn wherein such tithes were ever paid or compounded for to the vicar.

Mr. *Yorke*, solicitor general, and Mr. *Wilbraham*, argued for the plaintiff, that peas and beans sown in a garden are certainly small tithes: that fields are but as enlarged gardens, and the manner of husbandry cannot alter the nature of the tithes. In support of this was cited *Wharton v. Lisle*, 3 *Lev.* 365. which was a case concerning the tithes of flax arising in the parish of *Thorpe* in *Effex*, in which it appeared that the rector had always received the great tithes, and the vicar the small tithes, and it was holden, that flax being in its nature a small tithe, it made no difference whether it was sowed in gardens or in open fields; and though there appeared to be 26 acres of arable ground sowed with flax, it was holden, that the vicar was entitled to the tithes thereof; and by the opinion of three judges against *Holt*, judgement was given for the vicar. That the same point had been determined in this court by Lord *Hardwicke* in a case of *Smith v. Wyatt*, at the sittings after *Trinity* term 1742, that a vicar endowed of small tithes is entitled to the tithe of potatoes, as a small tithe, though set in open fields, and in great quantities. They cited also the case of *Barsdale v. Smith*, *Cro. Eliz.* 633. and 2 *Ro. Abr.* 335. pl. 7. where it was holden, that the word *garba*, strengthened with a usage, was sufficient to take in tithe-hay, which, they said, shews that without the usage it would not; and they argued that the evidence of the usage in this case could amount to nothing, for that it appeared by the evidence that this culture in the parish had commenced within about half a century.

But,

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Supra 615.

Supra 656.

Supra 749.

But, supposing the question to rest only on the instrument of endowment, it would be wholly on the defendants to shew that the tithes of beans and peas are included in the word *garba*, the vicar being endowed generally of all tithes *præter decimas garbarum*. They cited further *Nicholas v. Elliot*, *Bunb.* 19. to shew that the tithes of beans and peas are small tithes; and they said that *Gumley v. Birt*, *Bunb.* 169. was not contrary to this, for there the vicar could shew neither endowment nor usage. They cited further *Wallis v. Paine*, *Cam. Rep.* 633. where it was determined, that clover-seed, though gathered from open fields, was a small tithe. They argued further, that the words *decimæ hortorum* in the endowment included the tithes of beans and peas, as garden tithes, and the change only of the locality cannot alter the nature of them.

Mr. *Pratt*, attorney general, for the defendants, took notice of the great consequence of this case to all vicars and impropiators: that the gathering of beans and peas green from the stalk, must, from the nature of the thing, have been a very ancient usage; and that beans and peas must from their nature have always been a great tithe: that beans and peas dry must always have been considered as a rectorial tithe, and that there could be no reason to say that their being gathered green should make a difference; and if the rector is entitled to the tithe of beans and peas, he must be so, whether they are considered as dry or green.

Lord Keeper said, suppose *Indian* corn should be sowed here, would it be a great or small tithe?

To which Mr. Attorney General answered, that he conceived it must be taken as a great tithe, being of the general nature of corn, which is so.

As to the case of *Barsdale and Smith*, he said, that it shews the great extent in which the word *garba* may be taken, and weight being laid on the usage, it was the stronger to the present purpose, there being here the strongest evidence of usage that could be proved in any case, which he insisted upon as a most material circumstance. That the case of *Nicholas v. Elliott* was founded on the usage, as appears from the other case cited from *Bunbury*, of *Gumley v. Birt*. He cited a case of *Hodgson v. Smith*, in the Exchequer, 14th July 1715, *Bunb.* 279. wherein it was holden, that vetches cut green for fodder were a great tithe, as participating of the nature of hay. And as to the signification of the word *garba*, he insisted that it signifies not only what is, but what may be bound up,

Mr.

Mr. Cox, on the same side argued, that although the substantial question must depend on the old instrument of endowment, yet that here there were many incidents material to determine the rights of the parties: that the foundation of the defendant's claim is grounded on common right, and that the plaintiff's claim is against it; for that *prima facie* and of common right all tithes belong to the rector, and the vicar can claim none but what he can shew a right to either by endowment, or from usage of payment, which is evidence of endowment: that here an endowment being produced, the question is specifick, whether the tithes of peas and beans is included in it or not. But, as the general endowment of vicarages is of the small tithes only, and as all other tithes are called rectorial tithes, it may be material to consider at large, whether the tithe of peas and beans is to be taken as a great or small tithe; for if taken as a great tithe, it may substantially be said to belong to the rector; but, if considered as a small tithe, it would still rest as a matter to be shewn within the endowment, and it would be impossible to say with propriety that the gathering green or dry could make a difference. For suppose the exception had been of beans and peas generally, the gathering of them one way or the other could not have varied the right. It is difficult precisely to determine what great or small tithes are. In the *Codex*, 2 Vol. 691. great tithes are said to be corn, grain, hay, and wood, and small tithes to be predial tithes of other kinds, and also the mixt and personal tithes. Now grain may be said to be grain of all sorts, and therefore beans and peas are to be considered in their nature as great tithes; and then it seems to be allowed from the cases cited on the other side of *Wharton* and *Lisle*, and *Smith* and *Wyatt*, that the quantity of the lands sown with them, or the manner of husbandry, cannot alter their nature.

It seems probable that the first line of distinction between great and small tithes was made according to the quantity and value of things, and as the original culture of the lands in *England* was corn, hay, and wood, they were determined to be great tithes, and other things, being of less value and quantity, were let as small tithes. And though the reason of the distinction may not be regarded in particular cases, yet it has reduced things to a certainty, and is fit to be adhered to as a sound, permanent rule; and where new things have been introduced, the tithes of them have always been considered as great or small according as the things most participated of what were before determined to be great or small tithes.

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tithes. And though it is difficult to search out the true ground and foundation on which things depend, yet suppose corn to be sown in great quantities in a garden, it would be almost absurd to say that this could change the nature of the tithe. And it would be the same thing to suppose pot-herbs sown in great quantities in an open field should thereby change their nature with respect to the tithes. If then beans and peas come to their maturity are to be considered as corn and grain, and, consequently, that the tithes thereof are great tithes, the gathering of them green can no more alter their nature, than the particular manner of the culture can, where they are sown in open fields.

The case that seems to have occasioned the difficulty upon this matter is the case of *Sir Richard Uvedale v. Tindale*, reported in *Hutton* 77. where it is said, that quantity was holden to be sufficient to make that a great tithe which otherwise would be a small tithe. But it appears in the report of this case in *Cro. Car.* 28. that what was said by *Hutton* to have been the opinion of the court, was only the argument of serjeant *Hendon*, of counsel for the plaintiff; and it appears in *Cro. Car.* that *Hendon* having argued that they were *minutæ decimæ*, serjeant *Bridgeman*, of counsel for the defendant, cited a case of the dean and chapter of *Norwich* in 43 *Eliz.* where it was adjudged upon special verdict, that the tithes of forty acres of land sowed with saffron appertained to the vicar, and not to the parson; to which *Hendon* answered, that that was not because they were *minutæ decimæ*, but for that upon the endowment found, the allegation was, that the parson should have tithe of hay and corn only. But *Yelverton*, who was then a judge, said, that was not the reason, but that it was because they were accounted as *minutæ decimæ* and appertained to the vicar. And it is very remarkable upon this, that if such an observation was made by one of the judges of the court, it is impossible that the points mentioned in *Hutton* to have been agreed to by the courts could ever in fact have been so agreed to. Besides, the case as reported in *Cro. Car.* concludes with these words, "And all the judges resolved, that woad growing in nature of an herb, the tithes thereof ought to be reputed as *minutæ decimæ*;" and judgment was given for the defendant. The case therefore in *Hutton* thus considered plainly shews, that tithe must receive its denomination of great or small from the nature of the thing in question, and not from the time of gathering, or from the quantity or the place where it is sown. And it is plain from comparing the books together,

that all the writers who have endeavoured to maintain the contrary doctrine, or to raise doubts upon the matter, have transcribed their arguments from that mistaken case in *Hutton's Reports*, which is a posthumous work, and a translation only from the author's manuscript.

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As to the case of *Wharton v. Lisle*, it is reported in several other books beside *Levinz*; it is also in 4 *Mod.* 183. *Carth.* 263. *Skin.* 341, and 356. *Comb.* 201. 209. And as it is reported in some of the books, it appears that judgement was given by three judges against *Holt C. J.* that flax being a small tithe in its nature, ought not to be considered as a great tithe from its being sown in large quantities. But, upon considering all the books together it appears very far from being clear, that this judgement was in fact against the opinion of *Holt*. For it appears that the judgement was given in his absence, and therefore the objections mentioned to have been thrown out by him could only have been for breaking the case and throwing out his doubts. ~~to~~ the counsel, who were afterwards to argue it; and in *Skinner* there appears an adjournment by *curia advisari vult*, and he might afterwards satisfy his doubts, and alter his opinion, which judges now (I speak it with great deference) often do after a first or second argument. And if he did not concur with the other three judges in the judgement that was given, it can hardly be supposed that in a case of so great consequence in point of precedent, they would have given judgement in his absence. And it is plain that all his objections in their utmost force amount to no more than what is said in that mistaken case in *Hutton* before mentioned. And in the case of *Pain v. Underhill* in the Exchequer, it was said by *Comyns Chief Baron* in giving the judgement of the court, that *C. J. Holt* had changed his opinion, and was not against the judgement. Upon the whole, therefore, it must be submitted that beans and peas, as grain, are in their nature great tithes, and the manner of gathering them, or the culture, or the quantity, cannot alter the specifick nature of them.

Vide supra,
754.

Supra 749.

But be this as it will, as here a special endowment is produced, it must be admitted, that the substantial question in this case will depend upon the construction of the endowment itself, and the usage that hath been upon it. Now the principal words of the endowment are, *Quid vicarius habeat decimas herbarum ac omnimodas decimas præter decimas garbarum*. From the words *decimas herbarum* it hath been argued, that this *ex vitermini* includes the tithes of beans and peas, beans and peas being a garden tithe. But this is too

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flimsy an argument to deserve any laboured answer. Garden tithes are a distinct, specifick species of tithes, and every thing whatsoever renewing in the short compass of a garden would yield a small tithe, and even wheat itself. But this case would be no rule to judge of the nature of tithes in other cases. The true question therefore must depend on the construction of the word *garba*, and the usage.

Bishop Stillingfleet in that part of his *Ecclesiastical Cases*, p. 207. where he treats of the duties and rights of the parochial clergy, says, "In some appropriations there were vicarages endowed, and here the difficulty lies in distinguishing the tithes which belong to one from the other."—"The best rules I can find to be satisfied in this matter, are the endowment, or prescription."—"The greatest difficulty hath been about small tithes, which is the common endowment of vicarages."

Now, as the word "*garba*" in this endowment must in a great measure rule the determination in the present case, it will be very material to trace out its true meaning and definition from books of authority, and the sentiments of learned men; in order to see, not whether these tithes merely, but whether in general this species of tithes is or is not included in the word *garba*; for if it can be shewn to be so, it seems decisive of the present question; for then it will bring these tithes directly within the exception of what the vicar is not endowed of.

It must be admitted, that the word "*garba*" is of very complex, doubtful construction, and there seems to be no *English* word sufficient to take in the whole meaning of it. In *Du Fresne's Glossary* it is defined by the word "*manipulus*." In *Cruel* it is said to mean a *bundle*, and that in some places it is taken for a *handful*. In *Spelman's Glossary* it is defined by the word "*fasciculus, sive e frugibus, sive e lignis*," and by the words "*frugum suarum decimam garbam solventes*." In *Lambard's Collection of the Saxon Laws*, 139, among the laws of *Edward the Confessor*, the title of the eighth law is, "*De decimis ecclesiæ reddendis*," and then the first words of the law are, "*De omni annonâ decima garba Deo debita est*." But the most material construction of the word arises from *Archbishop Stratford's Constitutions* with *Lindwood's Comment*. These constitutions were made in the year 1342, in the time of *E. 3.* not long after the date of the endowment in question; and the fourth canon, as appears in *Lindwood* 188, was this: "Men blinded by
" the deception of a damnable sin cannot escape the perdition of
" their

" their souls while they pay the tenth *garb* of their fruits for
 " labour, and by mistake in counting pay the eleventh *garb* instead
 " of the tenth. We therefore, to obviate such damnable attempts of
 " perverse men by wholesome remedy, by the advice of this council,
 " do pronounce them to be involved in the sentence of the greater
 " excommunication." The original words are, "*erroris dam-*
 "*nabilis devio excæcati suarum animarum excidia non devitant, dum*
 "*frugum suarum decimam garbam solventes pro labore metentibus, eâ*
 "*minimè computatâ, non absque errore calculi, pro decimâ undecimam*
 "*solvunt garbam, &c.*" Then comes the "*Nos igitur.*" Here
 the word "*garba*" is applied to *fruges*, which must mean all the
 fruits of the earth; and it shews how the ecclesiasticks understood
 the word about the time when the endowment in question was
 made. But the gloss brings it more directly to the present question.
 Under the word *frugum* it is said, *Harum appellatione larga continetur*
reditus, et non solum talis qui de frumentis et leguminibus, (which is
 beans and peas), *verùm etiam qui ex vino, silvis cæduis, &c. capitur;*
 by which it appears, that *legumen* as well as *frumentum* was com-
 prized in the ancient signification of the word "*garba.*" And this
 corresponds with the reason of the grant, which was to supply the
 poverty of the religious house. But the gloss is still stronger under
 the word, "*metentibus,*" where it is said, "*Ex hoc verbo apparet*
 "*auctorem hic loqui de frugibus, in quantum ad messonem apta sunt,*
 "*ut puta, de frumento, hordeo, fabis, pis, (peas and beans), avenis,*
 "*milio, et cæteris hujusmodi, quæ meti solent.*" If this is of any
 authority, nothing can be stronger to shew that in the ancient
 ecclesiastical signification of words, beans and peas are com-
 prehended in the word "*garba.*" The text of the canon is cer-
 tainly binding *in re ecclesiasticâ*, and *Lindwood*, the author of the
 gloss, was undoubtedly a man of great judgement and accuracy, and
 very industrious to find out the true foundation of things. The
 book is taken notice of with great commendation by bishop
Nicholson in his account of the church historians in his *Englisch*
Historical Library, where he says the commentary or *gloss* was of the
 learned collector's own compofure, who was doctor of laws, official
 of *Canterbury*, and at last bishop of *St. David's*. And though the
 old canons made in convocation are not binding on the laity, yet
 that they are binding *in re ecclesiasticâ* was determined upon great
 consideration in the case of *Middleton v. Croft*, 2 *Str.* 1056. where
 it was holden, that the old canons concerning clandestine marriages

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were binding even on the laity, and a consultation as to this was awarded. Besides, the common law cases amount to the same thing. In *Southcote v. Southcote*, *Alleyne* 80, in an action of debt upon the statute of 2 & 3 E. 6. the plaintiff set forth that he was *propriarius decimarum garbarum et fœni, &c.* and that the defendant sowed certain land, containing so many acres, in that parish with grain, and after mowed it, and carried away the grain, not setting out the tenth part. After verdict for the plaintiff upon *nil debet* pleaded, it was moved in arrest of judgement, that the plaintiff hath entitled himself as *propriarius decimarum garbarum*, and demands tithes of grain in general, whereas *garbarum* is a word of uncertain signification, and divers sorts of grain are not wont to be bundled up, as rape-seed, mustard-seed, and cummin seed, which used to be thrashed out in the field. But the objection was overruled and the plaintiff had judgement. Which case plainly shews that *garba* may mean any sort of grain, and that it is not confined to corn only, or to such grain only as may be garbed or bundled up. And the case which has been mentioned of *Barfdale v. Smith* shews, that the word may be extended to the tithe of hay, where the usage has taken it to be so, which may introduce the question upon the usage in the present case.

Com. 510.

Now it is proved beyond all doubt that the tithe of beans and peas gathered green have been paid to the impropiator for above forty or fifty years, and no one instance whatsoever is produced of its ever having been paid to the vicar. It is surely then false reasoning upon this to say, that such evidence amounts to nothing: for that it appears by it that this kind of culture has commenced in this parish but for about half a century, and no longer; I say, this is false reasoning, because it appears from undoubted authority that *in re ecclesiasticâ*, a usage of forty years is evidence of a prescription, and that it is not like the common law prescription which must be time out of mind. By the statute of 2 & 3 E. 6. c. 13. which gives the treble penalty for not setting out tithes, it is provided that every of the king's subjects shall set forth their tithes in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid, and that no person shall henceforth take or carry away any such or like tithes which have been yielded or paid within the said forty years, or of right ought to have been paid. My lord Coke in his comment

on

on this statute, 2 *Inst.* 649. upon the words "within forty years," makes this observation: "This time of forty years is here set down because it is the usual time for the proof *de modo decimandi*." And at page 653. he says further, that "for the better understanding of this statute and our books, it is good to be known what the time of prescription for tithes is by the canon law. And the time for prescription in that case is forty years, by which time of prescription a spiritual person may gain by the canon law a right of tithes in another parish." And a little lower in the page he says, "that the custom once established doth continue." But there is a modern case remarkable to this purpose in 1 *Str.* 87. *Drake v. Taylor*. The vicar libelled in the ecclesiastical court for tithes of turnips, and laid his title to them by prescription and endowment. The defendant pleaded, that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips; and he moved for a prohibition *pro defectu triationis*, and obtained a rule *nisi*. But the rule was discharged, the question being between two ecclesiasticks, one or other of whom must be entitled; and it is indifferent to the tenant who has them; and Mr. Justice *Pratt* added this further reason, "because in the spiritual court fifty years make a prescription." And in *Sanderfon v. Claget*, 1 *P. Wms.* 657. Dr. *Claget* libelled in the ecclesiastical court against *Sanderfon* for the annual sum of 6 s. 8 d. as a procuration fee due by custom for visitations; upon which *Sanderfon* moved the *King's Bench* for a prohibition, and obtained a rule *nisi*. But it being an ecclesiastical duty, and claimed both by and from ecclesiastical persons, the court discharged the rule, and Lord C. J. *Pratt* in giving the opinion of the court said, "That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom, and by their law forty years make a custom or prescription." But further, in *Wallis v. Paine*, *Com.* 642. where the vicar being endowed of small tithes, the question was, whether clover-seed was a great or small tithe. And there, though the court determined it to be a small tithe, yet it appears that great weight was laid upon the depositions in the cause, by which it appeared, that the vicar for forty or fifty years had received the tithe. The words of the book are, "But in this cause it seems most evident it should be so taken, since by the depositions in the cause it appears that for forty or fifty years in this parish the vicars have received the tithe of this seed."

Supra.

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Which cases plainly shew what great weight the evidence in this cause ought to have in determining the nature of the tithe in question.

Besides this, a further argument for giving a liberal, extensive construction to the word "*garba*" arises from the clause of reservation of five marks yearly to be paid *de decimis garbarum*. There is no such specifick coin as a mark, nor ever was, any more than of a pound sterling; but it is well known that in the ancient computations a mark was reckoned at 13 s. 4 d. Five marks therefore must amount to 66 s. 8 d. a great sum to be paid out of these tithes, and especially, when it is considered as a reservation made above 450 years ago, when money at a moderate computation was worth at least ten times as much as it is now. In *Dugdale's Hist. of St. Paul's*, p. 32. and *Bishop Fleetwood's Chronicon Pretiosum*, p. 83. it appears that in the year 1302, which was within 17 years of the date of the grant in question, wheat was sold by the quarter at 4 s., malt ground at 3 s. 4 d., and other things in proportion, a bull at 7 s. 4 d., a cow at 6 s., sheep from 1 s. to 8 d., a capon 2 d. It cannot therefore be taken, but that the original intent of the grant in question was to reserve the *decima garbarum* to the religious house, in the fullest latitude and extent of the word: for taking it otherwise, it might be rather a charge than a bounty to supply their losses, and to serve for maintenance and hospitality.

Mr. *Lorke* in reply cited a case of *Smith v. Higgins* in the *Exchequer*, 24th June 1752, where the plaintiff, being a vicar endowed of small tithes, brought his bill for an account of tithes of hops, to which it was objected by the defendant, that though hops in a garden are small tithes, yet that being planted in great quantities in the parish, they ought to be considered as great and not as small tithes. And in support of this objection it was said, that peas and beans sown in a garden are small tithes, but in open fields are to be considered as great tithes. But the court with great clearness over-ruled this objection, saying, that small or great tithes are not to be distinguished by quantity, but from the nature of the things themselves; that hops are clearly in their nature a small tithe; and that peas and beans when cut green are small tithes, though sown in open fields, and though sown in never so great quantities; but that if they are left to come to maturity, and consequently to be grain, they are then great tithes.

The

The Lord Keeper, *Sir Robert Henley*, took time to consider the case, and afterwards in *Michaelmas term*, viz. 10th of November 1760, gave judgement to the following effect :

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This is a bill brought by the vicar of *Easfham* for tithes of beans and peas gathered green, and sold in the market. The bill seems to admit, that had these beans and peas come to maturity, the rector would have been entitled to them; and therefore the question is, whether from their being gathered green, and sold in the market, the vicar is entitled?

The rector is of common right entitled to all sorts of tithes: the vicar can claim against the rector only by endowment or prescription; and therefore in *Spring's case*, *Moor* 761. it is holden, that a rector cannot prescribe against a vicar endowed, because where an endowment is, no prescription can prevail against it. So, in the same book 910, *minutæ decimæ* carry not the tithes of glebe lands, because the endowment goes no further than the words of the donation carry it. In this cause it appears from the evidence, that the usage of gathering green is new and modern, occasioned perhaps by the increase of the inhabitants in this town and neighbourhood. But be that as it will, the plaintiff, the vicar, is in possession of no such right to the tithes of beans and peas gathered green; &c. by prescription. And the fact of usage giving the vicar no such right, I cannot decree for him upon his claim, until it is established at law to be the law, that the vicar is entitled to the tithes of such peas and beans.

But the endowment has been insisted upon on the part of the vicar, and this has been treated as a new case; and as it has been mentioned so to be by the counsel on both sides, I shall give my thoughts upon it.

That tithes are due *jure divino* is a doctrine now exploded: the right therefore depends upon municipal laws. By those laws the demand is given *de communi jure* to the rector, and the vicar's right can be only by endowment, or by prescription and usage as evidence of an endowment. There being no prescription in this case, it brings it to a question of construction upon the words of the endowment. The endowment was made by the bishop of *London* before any statute relating to endowments. The words are, "*Vicarius habeat et percipiat decimas hortorum ac omnimodas decimas præter decimas garbarum, feni et molendini.*" It has been insisted, that beans and peas gathered green, could not be *garba*, and therefore could not go to the rector, for that *garba* signifies grain bound-

1760. up in a sheaf, which beans and peas gathered green could not be. But this is a fallacy; for when the law speaks of "*garba*," or sheaves, it speaks of the whole produce, stalk and all. The word "*garba*" means *quod ligari potest*, and probably peas were actually garbed, when the word was introduced into the canon law; but since that, barley, oats, and peas are not garbed, and wheat continues to be garbed, because the straw is of value, and to preserve it unbroken; and yet barley and oats are *decimæ garbarum*, which words carry great tithes in contradistinction to vicarial tithes. *Spelman* explains *garbæ* to be such fruits of the earth as are naturally fit to be bound, and *Lindwood* explains it the same way. It follows, that "*garba*" means and refers to such grains, as when come to maturity were usually, or might be bound together, and does not extend to things improper to be bound.

The old cases make the nature of the thing to be the distinction between small tithes and great tithes. So is *Udale v. Tyndale*, *Cra. Car.* 20. *Wharton v. Lisle*, 4 *Mod.* 103. and *Bedingsfield v. Frake*, *Moor* 999. where corn was holden to be great tithes in a garden. And the modern cases concur with the distinction. *Nicholas v. Elliott* in *Bunbury* is unintelligible in itself, but has light given to it by *Gumley v. Burt* in *Bunbury*, where the distinction is holden.

There have been cited *Stephens v. Martin* and *Nicholas v. Elliott* against the distinction, and no other cases. The first case is answered by its being observed, that in that case it did not appear what the endowment was, or whether the impropiator contested it (t). And as to *Nicholas v. Elliott*, it appears by *Gumley v. Burt*, that the usage in that case made the difference. These cases prove these two propositions. 1st, That the vicar has no claim to tithes but by endowment or prescription. 2d, That where the endowment is not by special, but by general words, as *minutæ decimæ*, the law distinguishes between the tithes according to the nature of the thing; and the mode of the cultivation, as in a garden-like manner, does not alter the tithes, as in *Gumley v. Burt*; much less can the mode and time of gathering alter the right, which has attached in the rector before the time of gathering.

(t) This does appear by the report of that case in *Bunb.* 170, and it also appears by the respondent's printed case.

The rector is entitled at the time of committing the grain to the earth ; and it would make his right strangely precarious and uncertain to put it upon the management of the owner. If that were the case, then a great tithe gathered before it comes to maturity would be a small tithe ; and yet in *Hodgson v. Smith* in *Bunbury*, tares cut, whether green or ripe, are a great tithe. Nothing breaks into these resolutions, but that the Exchequer have determined the tithe of clover-seeds to be a small tithe. The reason the Exchequer made the difference between seed, and the other cases, was not grounded on reasoning, but on authority. It was because Lord *Coke* laid it down that seeds were *minutæ decimæ*, and the court of Exchequer did rightly in conforming with that rule, as it was established ; and therefore that case of seeds is to be considered as an exception to the general rule, and does not vary the rule itself. But this exception has never been carried further than to seeds, not to grain.

But another distinction has been taken from the application of peas and beans to the sustenance of man, not of cattle. But this will not hold, as it would go too far : for if things are small tithes, because used for the sustenance of man, it would comprehend all grain, as barley for beer or bread, and oats for bread or family uses.

Therefore I am very well satisfied in point of law, that these tithes are rectorial. But if I had not, I should have decreed against the plaintiff for want of enjoyment. Let the bill be dismissed, but, as it is a new case, without costs on either side.

This decree was afterwards affirmed in the House of Lords, 7th December 1762.

P. 33 Geo. II. A.D. 1760. Scac.

Vernon v. Sloane. [MS.]

To a bill for *Easter* offerings only, the defendant demurred. The demurrer was over-ruled.

1761.

P. 1 Geo. III. A. D. 1761. Scac.

Kynaſton v. Hatterſley. [3 Wood's Decr. 9.]

The impro-
priator of
St. Botolph
without
Aldgate, in
the county
of Middle-
ſex, claims
20 s. a year
from the
defendant,
in lieu of
tithes of a
houſe in Eaſt
Smithfield.

THE bill ſtated, that the plaintiff, for twenty-eight years paſt, had been ſeiſed in fee of the rectory impropriate of the pariſh of *St. Botolph without Aldgate*; that part thereof was in *London* or the liberties thereof, and other part in the ſuburbs of the ſaid city, in the county of *Middleſex*; that he, as impropriator thereof, was entitled to receive quarterly, for the time aforeſaid, all tithes and rates for tithes, ſums of money, cuſtomary payments, or other duties in lieu of tithes, and eccleſiaſtical duties, due by cuſtom or common right, or ſome rate, compoſition, or ſatisfaction for the ſame, and all other dues and profits to the ſaid rectory and pariſh church and the impropriation thereof for the time being belonging, and payable by the inhabitants, owners, and poſſeſſors of any houſes, out-houſes, ſhops, cellars, ſollars, warehouſes, lands, and grounds within the pariſh and the titlable places thereof, within the time aforeſaid, as well in ſuch parts of the pariſh as lie within the city of *London* and the ſuburbs of the ſaid city as in ſuch parts as lie within the county of *Middleſex*; that the defendant for ſeven years paſt, as well in his own right as in right of other perſons whom he repreſented, had been an inhabitant, owner, leſſee, and poſſeſſor of a dwelling-houſe, with the buildings and appurtenances thereto belonging, in *Eaſt Smithfield*, within the part of the pariſh which was in *Middleſex*, for which 20 s. a-year were due in lieu of tithes; that the defendant and the former owners or occupiers thereof had immemorially theretofore paid to the plaintiff and his predeceſſors, or their leſſees, 20 s. yearly for the tithes of the ſaid dwelling-houſe, ſtable, and other buildings, as an ancient compoſition for the tithes of the lands, on which the ſaid premiſes then ſtood, by yearly, half-yearly, and quarterly payments from *Chriſtmas 1729 to Lady Day 1752*, both incluſive; and that the ſaid ſums had been paid for the ſaid premiſes from the year 1666; that the defendant ought to have paid the ſaid annual payment in lieu of tithes for the ſaid premiſes, according to cuſtom time out of mind; that he had frequently applied to him for the ſame; but that he had reſuſed to pay. The bill further ſtated, that there had been ſeveral bills filed in this court by the plaintiff's predeceſſors
againſt

against the inhabitants and occupiers of houses and tenements within that part of the parish which was in *Middlesex*; and that they had been decreed to pay certain sums for the tithes thereof; and he prayed, that the defendant might be decreed to pay him for the tithes, duties, and profits, or the rate or composition in lieu of tithes, by him owing for his said house, stable, and premises, during the time aforesaid.

The defendant admitted, that the plaintiff claimed the rectory impropriate of the said parish: but denied that, to his knowledge, he was seised thereof in fee, or had any other estate of inheritance therein. He also admitted, that he was a lessee in possession of the house and building situate in that part of the parish of *St. Botolph without Aldgate* which is in the county of *Middlesex*, and had been so during the time mentioned in the bill; and said, that soon after he entered on the premises the collector of the tithes for the impropriator came and demanded of him tithes or a payment after the rate of 20s. a-year in lieu thereof, alleging, that the same was payable to the impropriator for the said premises, by virtue of some custom; that he being a stranger had paid the same until the year 1752; but that since that year he had not paid the same, or any part thereof; and he insisted, that no tithes or rate for tithes, or money in lieu thereof, were due or payable for the said premises, for that no tithes were due for houses or other buildings of common right; and that no custom to pay such tithes prevailed within that part of the parish of *St. Botolph without Aldgate* which lies in *Middlesex*. He also said, that the plaintiff, he believed, had exhibited his bill in chancery in the year 1747 against *Henry Willoughby* and others (*u*), occupiers of houses within the said parish,

The defendant says, that houses and other buildings are not tithable of common right; and that there is no custom, in that part of *St. Botolph* which lies in *Middlesex*, to pay the tithes demanded by the bill;

(*u*) Bill by the plaintiff as lay impropriator of the tithes of *St. Botolph's without Aldgate*, for tithes of houses upon a supposed, custom of payment of 1s. in 10s. according to the rent. The defendants deny the custom, and say, that a lay impropriator is not within 37 H. 8.

Mr. *Clarke* for the plaintiff cited 11 Co. Dr. *Grant's* case; and that a lay impropriator was determined to be within 37 H. 8. by the commissioners of the great seal, assisted by judges in *Brampton and Affey*, and *Brampton v. Cooke*, 7th and November 1657, and in two cases cited in that of *Hallams* and *Hallams*, and *Bearcroft* and *Fox*.

It was afterwards objected, that it appears by the books that the rector has taken less than the demand according to the supposed rate; and given receipts for the whole, which was deceitful only to get evidence, and does not warrant the custom paid.

Lord Chancellor.—I do not think that material; for it is impossible for the rector to discover the rent of every house; and he must either take what he can get, or bring bills of discovery against every occupier. And this is the reason that Lord Chief Justice

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and that if there is, the ground on which his premises stand was parcel of the possessions of the monastery of Graces, and so tithe free.

The evidence read.

parish, setting forth, amongst other things, that the defendants ought to have paid the plaintiff 1 s. out of every 10 s., and 2 s. out of every 20 s. yearly, and so in like proportion for every tenement above the rent of 20 s., ascending from 10 s. to 10 s. according to ancient custom time out of mind used in that part of the parish and rectory which lies in *Middlesex*; that the said defendants denied the custom; that on the hearing of the cause, an issue was directed to try the same; that the plaintiff declined proceeding to trial; and that his bill was afterwards dismissed with costs; that the plaintiff, he believed, had commenced several other suits against several of the inhabitants, and had thereby intimidated them to pay what he demanded for tithes, and had frequently given receipts in an unfair manner: and he further insisted, that no tithes were due for the premises occupied by him, not only for the reasons aforesaid, but because the ground and soil of the said premises, and other parts of the said parish, were, at the dissolution of monasteries, in the 31st year of *H. 8.* part of the possessions of the abbey or monastery of *Graces*, dissolved by the statute 31 *H. 8. c. 13.*; that the said monastery was one of the greater monasteries, and of the yearly value of 200 l.; that the same was discharged from the payment of tithes in respect of the lands belonging to it; and that the lands in the said parish were discharged of tithes. He denied that he knew of any decree or proceedings in this court between the impropriators and inhabitants of the parish; but said, that if any decree had been made, the same was obtained by collusion, and that he, the defendant, was not bound thereby.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon hearing counsel; and reading an indenture tripartite, dated the 12th of *June 1728*, signed *J. Raymond* and others; the answer, and the schedule annexed to it; the deposition of *Thomas Yewd*, which was objected to by the defendant's counsel; his cross examination to the first

tice *Holt* held a *modus* of this kind bad, because the rector could not know the rents: but it may be good as a customary payment of tithes here, because it gives the rector what he is not otherwise entitled to. Nor do I think that the custom is to be construed to confine the right to the rents as they stood at the time of the commencement, but to vary as they improve. But all I can do is to direct an issue on the custom laid in the bill. His Lordship directed the trial, and if the plaintiff by such a day waived the issue, the bill to be dismissed; and it was upon such waiver dismissed with costs. *Kynaston v. Willoughby*, March 2, 1753. *Select Cases in Chancery, in the possession of the Earl of Hardwicke.*

part

part of the fifth interrogatory as to other matters in the said fifth interrogatory, when the objection was over-ruled; the tithe-book of the collectors referred to by his deposition, which was objected to, and the objection over-ruled; the deposition of *F. Phipps*; and several entries in the tithing-book for that part of the parish of *St. Botolph's, Aldgate*, situate in the county of *Middlesex*, from 1673 to 1753; decrees in this court in *Easter* term, the 7th of *May*, and *Trinity* term, the 5th of *July*, in the sixth year of *William and Mary*, between *Umfreville v. Topping* (x); a decree in *Michaelmas* term, the 26th of *November*, in the same year, *Umfreville v. Campion* (y); a decree the 13th of *February*, in the fourteenth and fifteenth years of *Charles the second*, *Reynell v. Coppin*; and upon full debate; the court ordered the defendant to account to the plaintiff for the said sum of 20s. yearly demanded by the bill during the time aforesaid; and also to pay him his costs of suit when taxed.

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The tithes
demanded
by the bill
decreed.

(1) The case of *Umfreville v. Topping* and others, came before the court on the 7th of *May* 1694, *Easter* term, 6 *W. & M.* The bill demanded tithes, or customary payments in lieu thereof, for certain premises in the possession of the defendants in that part of the parish of *St. Botolph without Aldgate*, which lies in the county of *Middlesex*. To which bill the defendants answered, and the plaintiff, by a special replication, relinquished all tithes and dues antecedent to the 13th of *September* 1688; the defendants rejoined; and witnesses were examined; and upon reading the depositions, and the ancient tithe-books of the parish, the court decreed the defendants *Topping* and *Hart* to pay 2 s. 6 d. a quarter in lieu of the tithes of their houses, and also *Easter* offerings for themselves and their families; the defendants *Dirvenport* and *Webb* to pay 2 s. a quarter; the defendant *Jones* 1 l. 5 s. a quarter for his house in *King Harry Yard*; and as to the defendant *Middleton*, the court directed an issue to try, before the Chief Baron and a special jury, "Whether there is a *modus* of 20 s. a year, or another *modus* of 20 l. a year, or any and what other *modus* or *modus* exceeding 20 s. a year for the houses called *Hooker's Rents*, of which the defendant's house was one, on the north side of " *San Yard*?" and that if upon the trial the jury should find that there is no other *modus* than 20 s. a year for *Hooker's Rents*, the court will consider of costs for the defendant *Middleton* for the said trial. The cause came on to be further heard on the 14th of *May* 1694, when the Deputy Remembrancer was ordered to take an account as against the defendants *Grosse*, *Ratcliffe*, *Holbeck*, *Turner*, *Herne*, *Chetwin*, *Kendal*, *Smith*, and others, according to the different rates mentioned for their several tenements in the parish. On the 22d of *May* 1694, a decree *nisi* against *Holbeck*, *Turner*, *Kendal*, and *Chetwin*, was made absolute; and on the 5th of *July* following, the Deputy Remembrancer's report was ratified and confirmed. But it does not appear from the Book of Decrees and Orders, that any proceedings were had upon the issue.

(2) *2 Wood's Decr.* page 319.

H. 2 Geo. III. A. D. 1762.

Stephenson v. Hill.

THIS was an action brought upon the statute of 2 & 3 E. 6. c. 13. for the payment of tithes of corn and grain. The defendant pleaded the general issue, "*nil debet*:" and the cause came on to be tried before Mr. Justice *Bathurst*, at *Appleby* assizes, 14th August 1760.

Upon the trial, it appeared that the lands, whereon the corn mentioned in the declaration grew, were and immemorially had been customary lands, parcel of the manor of *Morland* in the county of *Westmoreland*, and holden of the lord thereof for the time being: that the said manor of *Morland*, and the appropriate rectory of *St. Michael, Appleby*, were parcel of the possessions of the priory of *Wetherall* in the county of *Cumberland*, which was one of the larger dissolved monasteries, and was vested in the crown by virtue of the stat. 31 H. 8. c. 13: and that the prior of the said priory at the time of the dissolution was and had been time immemorially seised of the said manor with the appurtenances in his demesne as of fee, in right of his priory; and also of the appropriate rectory of *St. Michael, Appleby*, and the tithes there: that the said manor and appropriate rectory being so vested in the crown, the same was in due manner granted to the dean and chapter of the Holy and Undivided Trinity of *Carlisle*, in fee; and that they are still seised thereof in fee, in right of their church; and that the present defendant was the customary tenant and occupier of the said lands, whereon the said corn grew, during the time in the declaration mentioned, and held the same of the said dean and chapter, as of their said manor of *Morland*: that the plaintiff is farmer of the corn and grain tithes growing and arising within the territories of *Bondgate* within the parish of *St. Michael, Appleby*, aforesaid; and the lands whereon the corn grew lie in the territories and parish aforesaid.

That no tithes had ever been yielded or paid for or in respect of the said lands: that all the other customary tenants of the said manor paid tithe: that this was the only customary tenancy belonging to the said manor, which was within the said parish of *St. Michael*.

Whereupon.

Whereupon a verdict was found for the plaintiff, subject to the opinion of the court of *King's Bench* upon the following question: "Whether the defendant could, in this case, set up any prescription which would, by virtue of the stat. of 31 H. 8. exempt him from the payment of tithe?"

Mr. *Aspinall* (who argued for the plaintiff, on *Tuesday* 24th of *November* last) made two questions of it, viz. first, whether the tenant can set up any prescription at all, to exempt him from the payment of tithe? secondly, whether the facts here stated are a sufficient foundation for an exemption, even supposing that he might set one up.

The second point, he said, might be taken first. The fact stated, "that no tithes have ever been paid," is no exemption, of itself: it is no prescription of exemption. It is only evidence: it might have arisen from unity of possession, or other causes. It would be no foundation for a decree in equity, if it had been actually found by a verdict "that they have never been paid."

Lord *Mansfield*.—The question between you must be, "whether they can, in point of law, prescribe in *non decimando*?" For if they can, the non-payment is good evidence of it, upon any foot of discharge.

Mr. *Aspinall*.—By law, the defendant cannot. For he must prescribe either in his own name, or in the name of the lord of the manor. But first, as he is a layman, he cannot prescribe in *non decimando* in his own name. Secondly, neither can he prescribe in the name of the lord of the manor. He must prescribe now, as if it still was at the time of the dissolution. A lord can only prescribe that the lands have been holden by his farmers and tenants at will. These are stated to be copyhold lands parcel of the manor of *Morland*, holden of the lord of the manor; not saying "at the will of the lord." Therefore they are customary freeholds. Now a lord cannot prescribe for his customary freeholders; though he may prescribe for his tenants and farmers of copyhold holden at will. These lands in the north are customary freeholds, and pass by feoffment and livery, and are not held *ad voluntatem domini*. Therefore they are not like copyholds: as appears by *Carthew* 432. *Gale v. Noble*—(trial at bar in ejectment for lands parcel of the manor of *Corsham* in *Wilts*). The expression "parcel of the manor" only imports "that they lie within the manor." The court will favour the better estate. Therefore, taking it to be a customary freehold, the lord could not prescribe

1762. prescribe in *non decimando*, in any manner whatsoever. He cannot prescribe as by the custom of the manor : for the custom of the manor, in general, is stated to be quite contrary.

Supra 218. The case of the bishop of *Winchester*, *Crouch v. Friar*, in many books, but most at large in *Cro. Eliz.* 784. will be urged against me. But supposing that to be law, yet the lord of the manor did not prescribe against himself as appropriate rector. He was founder ; and therefore a stipulation might be presumed : whereas here, the dean and chapter have had both the manor and the tithes in themselves. And that was a prescription for copyholders ; and the custom was prior to the parochial right of tithes ; which first commenced by the council of *Lateran*, in the time of king *John*. Nor can he be exempted by unity of possession. Unity of possession is a distinct thing from prescription. Besides, here he cannot rely upon unity of possession ; because it has been in other hands from time immemorial. And copyholders at will cannot be exempted by prescription.

Mr. *Clayton*, for the defendant.—No tithes have been ever paid for these lands from 31 *H. 8.* And after this length of time, a legal exemption will be presumed. This was a great abbey, which came to the crown by the stat. of *H. 8.* And the manor was in the prior, in right of his priory. These lands were therefore discharged from payment of tithes at that time ; and their discharges from tithes are preserved to the crown and to its grantees and assignees, by 31 *H. 8.* in the same manner and to the same extent as when they were in their hands. Spiritual persons may prescribe in *non decimando* ; and so may their farmers and tenants ; and even their copyholders of inheritance. 1 *Ro. Abr.* 653. pl. 2, 3, 4, 5. 2 *Co.* 44. Bishop of *Winchester's* case. *Cro. Eliz.* 216. 475. 511, 512. 704. 784. *Mossre* 219. *Branch's* case. *Yelv.* 2. *Noy* 132. anonymous. And customary estates of inheritance may be discharged in the same way ; for the freehold is in the lord. These customary estates in the north are not freeholds, but copyholds, and in the nature of tenancies at will. They never pass by feoffment, but by grant ; and often by grant and admittance : but an alienee cannot maintain an ejectment till admittance ; for the estate does not pass to him, as it does to the heir by descent.

Though many other parts of this estate have paid tithe, yet there may be a prescription for a discharge for part : a prescription may be for a single part alone. But this is the only tenement that lies
in

in this particular parish. As to the unity of possession, supposing it liable to a doubt, yet you may prescribe, "that the prior held it discharged time immemorially." *Priddle v. Napper*, 11 Co. 14. And the case of *Wright v. Gerrard and Hildersham*, agrees, "that a unity and a perfect discharge may stand together;" and cites 11 Co. 14. as truly saying so. 2 Keb. 459. * *Englisb v. Johns*. That a unity of possession, and a perfect discharge from tithes, may stand together, cannot be disputed. Here, no tithes have ever been paid. Therefore the court will presume a legal discharge. This is a unity, time out of mind: which is a sufficient discharge. The prior was seised both of the rectory and of the land. It was not necessary to be in actual possession of the lands. *Hub. 306. Wright v. Gerrard and Hildersham. 11 Co. 14. Priddle and Napper's case. 2 Co. 48.* The Archbishop of *Canterbury's* case. These customary tenures are not freeholds: the timber, the mines are in the lord. Therefore it is the common case of copyholders: which has been determined over and over; particularly in *Cro. Eliz. 784.* in the case of *Crouch v. Fryer*. It is enough, if we are discharged in any manner.

* This was a plea of discharge by reason of the unity. But it was adjourned.

Mr. *Aspinall*, in reply.—It shall not be presumed "that tithes are not payable," because they have not been paid. The case I mentioned is a prescription for the bishop himself, his farmers, and tenants at will. These customary estates are not copyholds: the freehold is in the tenant. 1 *Salk. 365. Crouther v. Oldfield*. They pass by the deed †, not by the admittance. Here was no unity of possession in the prior of the rectory and of the lands. *Moore 528. Benson v. Trott. Moore 219. Branch's case. Cro. Eliz. 704. Crouch's case*. Here, the tithes arise, upon leasing out the lands. The unity ceases, when the prior ceases to hold both lands and rectory together. Either by prescription or by unity, the lands ought to be charged.

† But it seemed agreed, that in every manor, there is either an admittance, or a licence; and every thing is in the lord, that custom has not taken out of him.

Uterius concilium.

This cause now standing in the paper for further argument; Mr. Solicitor General (Sir *Fletcher Norton*), who was for the plaintiff, said, that the particular customs of the manor (which had been inquired after, in the course of the former argument) were not yet sent up.

Lord *Mansfield*.—What signify the customs? clearly, the freehold is in the lord.

Sir *Fletcher Norton* acknowledged that he had a great difficulty to get over; it being stated in the case itself, "that this was the

1762. only customary tenant belonging to the manor, which was within this parish."

Lord *Mansfield* and Mr. Justice *Denison* said, it was a settled point, "that the freehold is in the lord." And Lord *Mansfield* added, that this is rather stronger than the case of copyholds: for copyholders had acquired a permanent estate in their lands, before these persons had done so.

Per Cur.—Let the posse be delivered to the defendant, in order for a judgement of nonsuit.

P. 2 Geo. III. A. D. 1762. Scac.

Henning v. Willis.

A lessee of tithes by parol cannot maintain a suit for them without making the impropriator a party.

THE bill stated, that *G. Tronchard*, deceased, being, in his lifetime, impropriator of the tithes thereafter-mentioned, did, by indenture dated the 24th of *December* 1756, demise to the plaintiff "all those his impropriate tithes arising on the several farms and lands in the several parishes or hamlets of *Stratton* and *Grimston*, to hold from the 5th of *April* then next for one whole year;" that upon his death his son granted to the plaintiff the same for another year; that thereby the plaintiff, for the said two years, became entitled to have and receive the said tithes; that the defendant, during the time the plaintiff was so lessee, had divers tithable matters on *Langford Farm*, as enumerated in the bill; but that he had concealed the quantities, qualities, and values thereof, and had refused to make the plaintiff any satisfaction for the same. The bill therefore prayed a discovery and account of the several tithable matters.

The defendant, to so much of the bill as sought to compel him to discover the tithable matters he had on the said farm from and after the 5th of *April* 1758, or the value thereof, or to account for the tithes thereof, demurred in law, for that the plaintiff had not by his bill stated any case that would entitle him to the discovery or relief thereby prayed from and after the 5th of *April* 1758. With respect to the residue of the bill, the defendant insisted, that he had fully set out his tithes in kind, and had paid or satisfied the plaintiff for all the tithable matters and things which he had on any of the lands occupied by him within the several parishes or hamlets.

The plaintiff submitted to the demurrer, and, amending his bill, added thereto *J. Trenchard*, the owner of the tithes. But before he amended his bill, the defendant made a tender of the value; but the plaintiff refused to accept it without the costs, which the defendant would not pay. The cause therefore went on, and upon the bearing, the defendant having proved the tender, the court decreed him to pay to the plaintiff the money tendered, and the plaintiff to pay to the defendant the costs of suit; because at the time of the tender no costs were due, the plaintiff having no title.

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MS.

Tr. 2 Geo. III. A. D. 1762. Scac.

Thorpe v. Bendlowes. [3 Wood's Decr. 38.]

THE bill stated, that the plaintiff, on or about the tenth of *June* 1725, was presented to the rectory of *Houghton* in the county of *Durham*, and had thereby become entitled to take in kind all manner of tithes, both great and small, arising therein; that the defendant, since *January* 1755, had been occupier of divers lands and closes within the said parish, and particularly of *Mason's Close*, and *Bridge End Close*; that he had yearly several tithable matters growing thereon; that he had yearly depastured thereon, or on part thereof, barren and unprofitable cattle, as well of his own as of other persons, taken in to agist for hire; particularly, divers young wheys and other young cattle, which he had sold; that he had also grafs growing on his pasture lands, which he had cut and made into hay, but that he had never set out or paid the plaintiff the tithes of the same; that in 1754 he had accounted with the plaintiff for all his tithable matters then in arrear, and had at that time, and for several years before, paid to him 1 s. 6 d. in the pound rent for his agistment tithe and the renewals of his pasture lands; but that he afterwards pretended that no tithes were due for the same, except some small *modus*; that he also pretended that he had not agisted upon his lands any other barren and unprofitable cattle than certain horses which he kept for the use of his coach, and had not used for labour, profit, or sale; and that therefore no tithe was due for the same. But the bill charged, that as such horses were not kept and used for pleasure only, but were, during the same time, employed by the defendant in leading and carrying coals from the pits to *Houghton*, and also in drawing manure from divers places out of *Houghton* parish to

An agistment tithe, it seems, is due for coach horses.
S. C. 3
Burn's E. L.
433. S. C.
Rayn. 508.

1762.

lands belonging to the defendant within the parish, and also in drawing lime, timber, bricks, and other materials used by the defendant in buildings, and in other work and labour, whereby he made great profit, that he, the plaintiff, was well entitled to tithe agistment of all such horses, or to some reasonable satisfaction for the same; but which the defendant had refused to make. The bill therefore prayed, that the defendant might be decreed to pay to the plaintiff all and every the tithes aforesaid subtracted by him, or the just value thereof, that had, in every year since the first of *January 1755*, become justly due and payable from him.

The defendant admitted, that the plaintiff was lawful rector, and entitled to all manner of tithes in kind within the parish, or to a reasonable satisfaction in money for the same, according to the custom of paying tithes therein; that about eleven years ago he came to reside at *Houghton*, and had ever since been an inhabitant thereof; that before, and ever since the 1st of *January 1755*, he had been, and then was, occupier of *Mason's Close* and *Bridge End Close*, which he used alternately either in meadow or pasture, and had depastured several horses and cattle thereon, viz. that he had, for about twelve or thirteen weeks, depastured therein at nights saddle and coach horses; but he averred, that the said horses were hackney geldings and horses kept for his pleasure, to draw his coach, and for himself and servants to ride upon; that they were not used for hire, or brought or bred for sale; and he submitted, that the plaintiff was not entitled to tithe for the depasturing of such saddle and coach horses, or for any barren and unprofitable cattle so kept for his pleasure, and not for profit or sale. He further said, that he had depastured a milch cow and a one year old whey upon *Mason's Close*; that by the immemorial custom of the parish the parishioners paid, and the parson received, three halfpence for the yearly renewal, and in full satisfaction of the tithe agistment of each milch cow under the number of five; that no tithe was paid for the agistment of any young wheys bred and depastured in the parish until they had calves, when they were reckoned milch cows; and that the parishioners then paid the parson three halfpence for the yearly renewal, and in full satisfaction of the tithe agistment of each milch cow under five; that, according to such custom, the plaintiff had received of the defendant three halfpence for the said milch cow for the year 1755; and he insisted, that no more tithe was due to the plaintiff in that year for depasturing the said cow and whey as aforesaid. He also

also said, that in the same year he had taken in to agist one milch cow for about eleven or twelve weeks; and that he believed the owner thereof had paid to the plaintiff three halfpence for the yearly renewal of the tithe agistment of such cow, according to the custom. He further said, that in the said year *Bridge End Close* was in meadow, and that the plaintiff took the tithe-hay thereof in kind; and that in the year 1756 *Mason's Close* was in meadow, of which he had also taken the tithe-hay in kind. He also said, that in the year 1755, wanting straw to make ropes for the covering a hay-stack, he cut a small quantity of coarse grafs in *Mason's Croft*, for which he tendered the plaintiff 2s.; and that in 1759 he had also cut some grafs to top a stack with, which he made into hay, and set out the tithes thereof; both of which the plaintiff refused to accept: and he set forth the tithable matters and things he had on the said closes the following years; and insisted on the said custom of three halfpence; and that no tithe agistment was due for his coach and saddle horses, though he admitted he had occasionally employed them to fetch coals and draw manure, &c. (z)

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon hearing counsel for each party, no evidence being read, the court ordered the Deputy Remembrancer to take an account of what was due to the plaintiff from the defendant for the tithe agistment of the wheys in the pleadings mentioned to have been agisted by the defendant, of the coach horses and other barren and unprofitable cattle depastured by him during the time demanded by the bill; that the bill be dismissed as to the demand of tithe-hay mowed and used in the manner and for the purposes in the defendant's answer mentioned, but without costs; that the defendant do pay the plaintiff his costs to this time, to be taxed; and that further directions be reserved till the coming in of the report.

(z) It is said by *Dr. Burn*, that it was proved in the cause, that the defendant made a profit of the horses, by employing them to fetch his coals at ten miles distance out of the parish, and in loading manure, bricks, and wood, from the parish of *Houghton* to his lands in the adjoining parish of *Darlington*—But it could be proved no otherwise than by the defendant's admission in his answer; for it is expressly stated, "that no evidence was read." And it is remarkable, that the Decree-Book does not say, that the decree went upon any such admission, as it does with respect to the agistment of the wheys; and from the language of it, it should rather seem that it proceeded upon the general ground, without reference to the circumstance of profit, "coach horses and other barren and unprofitable cattle."

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In the year 1766 the plaintiff died; and his son filed his bill of revivor and supplemental bill against the defendant, and revived the suit; and soon afterwards the defendant died, whereby the suit became again abated, and a second bill of revivor was filed in 1769 against the widow and executrix of the defendant; to which she appeared and put in her answer, and admitted the former proceedings, but did not admit assets sufficient; and the said suit and proceedings were again revived.

The Deputy Remembrancer made his report, dated the 7th of *December* 1772; and on the 21st of *December* 1772, upon hearing counsel for the plaintiff, and none appearing for the defendant, and no exceptions having been taken to the report, the report was ratified and confirmed, and the said defendant ordered to pay the plaintiff the sum reported due for the tithes and costs, and also his subsequent costs of this suit, to be taxed, *viz.* for the agistment tithes of the wheys agisted by him, and also for the coach horses and other barren and unprofitable cattle depastured by him, 1 l. 19 s. 7 d. and for his costs taxed 146 l. 8 s. 4 d.

Tr. 2 Geo. III. A. D. 1762. In Canc.

Williamson v. Gosling. [MS.]

BILL by the plaintiff as devisee and executrix of *Joseph Taylor* deceased, owner of the impropriate rectory of *St. Dunstan's in the West*, stating the statute of 37 H. 8. and the decree, and charging that the defendant *Gosling* had been owner of several decayed houses, for the tithes of which several pecuniary compositions had been taken; but that the said houses not being inhabited the defendant pulled them down, and built two new houses, for which the defendants ought to have paid tithes according to the said statute, but which they refused.

The defendants insisted upon the proviso in the act in favour of less payments, and they set up several customary payments in lieu of the tithes of the four old houses, and contended that the new houses were built on the same site with the old, and therefore that the amount of the said ancient customary payments only was due.

The court decreed payment according to three of the customary payments set up; and decreed the defendant to account with, and pay to the plaintiff for the tithes of the premises built on the ground where the house called, *The Gentleman and Porter Alehouse*, once stood, after the rate of 2 s. 9 d. in the pound with costs.

M. 3 Geo. III. A. D. 1762. In Canc.

Kynaston v. Miller.

BILL filed by the plaintiff, as the impropiator of the rectory of the parish of *St. Botolph without Aldgate*, praying relief under the statute of 37 H. 8. and the decree therein mentioned; stating, that in manifestation of his right, he had some time before filed his bill in the same court against *Joseph Watton* and others for the same ends and purposes as the present bill, and that the cause was heard on the 23d of *February* 1741, when the court declared that the plaintiff, as impropiator, was entitled to tithes of such premises as were within the city of *London* according to the said statute and decree, and decreed an account accordingly: that the defendants notwithstanding refused to discover the yearly rents or value of the said houses, or to pay their tithes: the bill therefore prayed a discovery and account.

The defendants admitted the plaintiff's right as impropiator to all tithes, rates, customary payments, and other duties in lieu thereof by custom or common right, but knew not whether to any sums in pursuance of the said statute and decree. They submitted that the said rights payable by the said decree were substituted in the place of offerings and oblations due to officiating ministers. The defendants claimed an exemption from tithes, the land where their houses stood being formerly the site of a monastery; and they also contended, that the suit should have been instituted before the Lord Mayor of *London*, as the plaintiff claimed under the statute and decree.

On reading the decree in *Kynaston* and *Watton*, and the several exhibits, the Master of the Rolls declared, that the plaintiff, as impropiator of the parish of *St. Botolph without Aldgate*, was, by virtue of the act of 37 H. 8. and the decree therein mentioned, entitled to payments in the nature of tithes from the defendants, as occupiers of the premises mentioned in the said act of parliament, and not comprized within the proviso therein contained; and decreed an account accordingly, with costs.

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M. 3 Geo. III. A. D. 1762.

Breary v. Manby. [3 Wood's Decr. 43.]

S C 3 Burn.
E L. 397.
S C. Rayn.
510.

THIS was a bill by the plaintiff, as rector of *Middleton upon the Wealds* in the county of *York*, which stated (*inter al.*) that the defendant, from *May 1736*, had been, and still was, the occupier of a piece of ground, called, *The Twelve Oxcgangs*, lying in flatts, and of two closes, called, *Swang Close* and *South Close*; of several orchards, gardens, and yards; and that he had several tithable things thereon, the tithes whereof he had refused to pay.

The defendant, in his answer, said, that *The Twelve Oxcgangs*, *Swang Close*, and *South Close*, as part thereof, were, and had ever been from time immemorial holden, occupied, and enjoyed, by the respective owners thereof and their respective tenants and farmers, freed and discharged from the payment of any tithes whatsoever; but that he being only tenant thereof, and not having any ancient records or deeds relating to the same, could not set forth his exemption, but hoped that his landlord would, when called upon. He admitted, that during the several years he had occupied them, he had growing thereon corn, grain, and hay; but insisted, that he ought not to set forth the particular kinds of each in the said years, by reason of such exemption; and he denied that he had ever admitted that tithes were payable for the said *Twelve Oxcgangs*.

The plaintiff replied; the defendant rejoined; and witnesses were examined in the cause; and upon hearing counsel; and reading several depositions and the answer; and upon full debate of the matter; the court ordered the defendant to account with the plaintiff for the tithes of all his corn and grain arising on the *Twelve Oxcgangs* and two closes called *Swang Close* and *South Close*, during the time demanded by the bill (a).

(a) Dr. Burn, in his report of this case, says, that the court, at the hearing of the cause, was clearly of opinion, that the mere non-payment of tithes, though for time immemorial, would not be an exemption from payment of them, without setting out and establishing such exemption to have arisen from the lands having been parcel of one of the greater abbeys; and therefore decreed the defendant to account for the tithes of that part of his estate, for which he claimed the said exemption.

H. 3 Geo. III. A. D. 1763. In Canc,

Mallock v. Browfe. [Ambl. 423.]

BILL by the plaintiff, as impropiator of the rectory and vicarage of *Termoham* and *Cockington* in *Devonshire*, for tithes of apples, except for ancient orchards, in respect of which the bill admits a *modus*. The defendant in his answer, which was very confused and unintelligible, set out the copy of a paper-writing, which he had from the steward of — *Carew* esq. containing an account of a *modus* in the parish of *Cockington*, which account the defendant said in his answer he believed to be true; and in it is said “cyder 2d. *per* hogthead.” In another part of the answer he insisted, that tithes of apples, though grown in lately-planted orchards, are not payable in kind.

If it appears that a pecuniary payment has been made for any sort of tithe, the court will help the imperfect manner of setting out the *modus*.

It was insisted for the plaintiff, that it did not appear what the *modus* was, which ought to be set out with some degree of certainty, that the plaintiff may know what the defendant relies on, and how to apply his evidence.

Sir Thomas Clarke, Master of the Rolls.—If it appears that a pecuniary payment was made for any sort of tithe, the court will help the imperfection in the manner of setting out the *modus*, and put a sense upon the words. He accordingly directed an issue to try, whether a *modus* of 2d. *per* hogthead of cyder was payable throughout the said parish in lieu and satisfaction of tithes in kind for the apples which were used in making such cyder.

P. 3 Geo. III. A. D. 1763. In B. R.

Moncafter v. Watson et al. [3 Burr. 1375.]

THIS was a case reserved from the northern circuit, in an action brought on 2 & 3 E. 6. c. 13. by a lay-impropriator against the occupiers of lands in the parish of *Felton* in the county of *Northumberland*, for taking away their corn and hay, without setting out the tithe, or agreeing for it.

The substance of the case stated was, that they claimed to be exempt from paying any tithe at all for these lands, upon the following foundation, *viz.* that a private act of parliament was passed in the year 1753, (26 Geo. 2. c. 46.) “for dividing and inclosing

1763. inclosing the common called *Felton Common* in the parish of *Felton* in the county of *Northumberland*." That the lands in question had been, till the said year 1753, (when the said common was so divided and inclosed) part of the said common, whereon the commoners had used to have common for their cattle levant and couchant, &c. That 90 acres, part of the said common, were, by the said act of parliament, allotted to the owner of *Swardland* demesne; under which allotment, the defendants occupy the said 90 acres, formerly parcel of the common, but now made parcel of *Swardland* demesne. That the act directs that the divided lands (before parcel of the common) shall be holden by each person to whom the respective divisions are allotted, subject to the same charges and incumbrances as their own former lands to which they are allotted and consolidated, were before subject: and it is declared in the act itself, "that it shall be construed beneficially to the said land-owners to whom the respective divisions are allotted." That the owners of *Swardland* demesne had never paid tithe of corn, grain, or hay, having been always exempt from the payment of tithe of corn and grain, in consideration of having kept in repair the north end of *Felton* church; and being exempt from the payment of tithe of hay, under a *modus*.

The question stated upon the case (and the only question then intended to be brought before this court) was, "Whether the occupiers of these 90 acres, late parcel of the common, but now allotted to the owner of *Swardland* demesne, are or are not liable to the payment of tithe of corn and hay?"

But the counsel, when they came to argue it, made two questions, viz. 1st, "Whether *Swardland* demesne was itself exempted from the payment of tithe for corn?" (It was agreed to be exempt from tithe of hay in kind by the *modus*). 2dly, "Whether the 90 acres of inclosed common be exempted from tithe of corn and hay?"

However, the court would not enter into the first question, ("Whether non-payment of tithes can be set up against a lay-impropriator, as a presumption of title?") because it was most clearly never intended by the parties to be meddled with by the present action.

As to the second question, Mr. *Wallace*, who argued for the defendants, contended, that as the allotment was to bear all the burthens of the ancient estate to which it was now annexed, it ought therefore to enjoy all the privileges of it: and as this ancient
estate

estate was exempt from tithes, so also ought the allotted 90 acres to be. And he relied very much upon a case in the court of Chancery, determined by Lord *Hardwicke* on 15th July 1748; which he cited as in point: the name of it was *Stockwell v. Terry*. ^{Supra.} *Stockwell* was rector of the parish, and filed his bill against the occupier of some land (then ploughed up) for tithe of the corn which grew upon it. The defendant insisted upon a *modus* of 15s. in lieu of all tithes arising upon the *Grange Farm*; and that the *Grange Farm* had never paid any tithes. Then he shewed, that the land for which *Stockwell* demanded this tithe of corn by his bill, had been part of a down which had been inclosed by a private act of parliament, and had been thereby allotted to and had ever since continued part of the *Grange Farm*; and therefore ought to be exempt from all tithes, as well as the *Grange Farm* itself. And Lord *Hardwicke* dismissed the rector's bill, so far as it related to this land which had been down-land, and was so allotted to the *Grange Farm*.

Mr. *Thurlow*, for the plaintiff, argued, that notwithstanding this decree in *Stockwell's* case, yet in the present case (which differs much from that) the allotted common is not exempted from the payment of tithes. This demand of the impropiator, in the present case, is a claim of the tithe of corn, grain, and hay. But corn, grain, and hay, could not be part of what grew on a common: the tithes that arose upon this common (appendant to *Swardland* demesne) could have been only tithes of agistment, or of lambs, calves, wool, milk and other things that could be the produce of a common.

Now a *modus* or other compensation must be in lieu of these specifick tithes. This exemption therefore cannot relate to any other tithes but such as could in their nature have arisen out of the common: so that it is not within the substantial idea of the *modus* or compensation insisted upon by way of exemption from paying tithe for these lands, which were part of the common, but now bear corn, grain, and hay. For the rector could have no benefit from this *modus* which was confined to the tithe of corn, grain, and hay, in respect of any of that sort of tithe which could arise from the common, whilst it remained common. Tithes are not issuing out of the land, but collateral to it: and they cannot be discharged but by special words; which this act does not make use of, the words of it being only general words. *Cro. Eliz.* 161. *Perkins v. Hinde*, 11 Co. 13 b. S. C. 1 Leon. 300. *Stile v. Miller*,

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Owen 39. *S. C.* An exemption may be easily destroyed. An alteration of the use of the land will destroy it: as, where a buck or doe is to be paid out of a park, and the park is disparked. For which he cited *Hutton* 58. *Poole v. Reynold* upon a prescription “to be discharged of all tithes, by delivering deer annually:” and the park was afterwards disparked. Here, the exemption claimed is, “to be discharged of the tithe of corn, grain, and hay, arising and growing on *Swardland* demesne.” But the common now inclosed and allotted was not, whilst it was common, capable of producing either corn, grain, or hay. Therefore it is not exempt from tithe of corn, grain, or hay. If a mill be discharged of tithe, and the owner turns the water-course but a very little way, and re-builds his mill upon such turned water-course, this re-built mill shall not be discharged. 1 *Ro. Abr.* 652. title *Dismes*, letter *F. pl.* 2. So that changing the substance of the exemption is sufficient to destroy it; even supposing it to have been a good one.

Lord *Mansfield*.—The case of *Stockwell v. Terry* differed very much from the present case. The *modus* insisted upon in that case extended to all kinds of tithes: whereas the exemption insisted upon in the present case is confined to the specifick land called *Swardland Demesne*, and does not extend to the right of common. Here is no equivalent at all for the tithes of agistment, of wool, milk, lambs, or any other tithes of such a kind as could arise upon a common. The equivalent goes only to corn, grain, and hay; the tithe whereof could not arise upon the common, whilst it remained a common. In the case cited, the rector was, as owner of the glebe, a party to the act of parliament: here, the impropiator is not a party to this act of parliament. And there, the *modus* covered the right of common: it was a *modus* of 15s. which was paid for the *Grange Farm*, in lieu of all tithes arising upon it, “and of all the tithes of all the cows and sheep belonging to that farm that should be depastured on the said down,” (which was afterwards inclosed and allotted to it). So that the *modus* covered not only the *Grange Farm* itself with its appurtenances, but the common also; which is not the present case. Lord *Hardwicke* decreed, “that that *modus* should stand for the allotted lands, as well as for the *Grange Farm* and its appurtenances;” and accordingly he dismissed the bill as to those lands which the *modus* covered; but as to all the other lands of the common, which had before used to pay tithe of wool, agistment, and other small tithes, he decreed an account. Here, all rights are saved, generally, by this act of

26 G. 2. consequently, the impropriator's right to tithes remains : and there is no need to shew how they are due ; because they are due of common right.

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The whole court were very clear, that in the present case the exemption and *modus* did not extend to the waste and common ; and therefore that the allotted lands, which had been part of that waste and common, having been subject to tithes before the allotment, must remain liable to them after it : which they held to differ materially from the cited case, where the *modus* did extend to the waste and common. They understood the words, " subject to the same charges and incumbrances as their former lands were subject to," to mean only incumbrances upon the estate, (as dower, &c.) ; and not to intend its being subject to the repair of the church of *Felton*.

Lord *Mansfield* said, that the case was determined upon the same ground as Lord *Hardwicke's* decree went upon, *viz.* that what was before exempted shall remain exempted ; and what was not before exempted shall pay tithe.

Per Cur. unanimously. Let the posita be delivered to the plaintiff.

Tr. 3 Geo. III. A. D. 1763. Scac.

Torriano v. Legge.

THE plaintiff, as rector of the parish and parish church of *Chingford* in the county of *Essex*, filed his bill against the defendants for an account of great and small tithes.

S. C. 1 Black.
Rep. 420.
S. C. Raym.
519.

The defendants admitted, that the plaintiff was rector of the parish ; and that they had, for several years past, occupied arable, meadow, pasture, and grass grounds, in the parish ; but denied that they ought to pay him tithes in kind for the same, for that the following *moduses* had been immemorially paid for the said land, and for all other lands in the parish. First, 5 s. an acre every year for all lands sowed with wheat. Secondly, 2 s. 6 d. an acre for all lands sowed with oats or any other grain excepting wheat. Thirdly, 1 s. 4 d. an acre for all grass lands mowed, called *Uplands* or *Forest Lands*. Fourthly, 2 s. an acre for all grass lands mowed, called *Meadow* or *Pasture Lands*, in lieu of all tithes of hay, grass, and pasture. Fifthly, 4 d. a-year for every orchard, in lieu of all tithes of fruit within the parish. Sixthly, 6 d. yearly for every cow kept and

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and depastured upon the *Uplands* or *Forest Ground*, and 9 d. upon the meadow or pasture lands, in lieu of all tithes of cows, calves, and milk. Seventhly, 2 s. 6 d. for every farrow of pigs, in lieu of tithe of pigs; and that the said *modus*es for corn, grain, grass lands, orchards, and cows, were due and payable on *Michaelmas Day* yearly: that they had constantly, until the year 1757, paid the said *modus*es in the same manner as the other landholders within the said parish had paid the same to the former rectors of the parish; and that they had always been received by former rectors in lieu of their respective tithes: that the plaintiff having insisted on having tithes in kind for the year 1759, the landholders, to avoid suits, and for peace's sake, submitted to pay him tithes in kind for that year, hoping that he would have accepted of the said *modus*es for the future, which, however, he had refused to do: that the landholders, in the month of *May* 1761, accordingly signed and sent notices to him that they would not set out, or suffer him or his agents to take any tithes in kind of them for that year, or for the future, but that they would punctually pay his tithes as they should become due, according to the ancient manner of paying in that parish. They admitted, that they had, for several years past, occupied divers parcels of arable, meadow, pasture, upland, and forest grounds in the parish; and set forth the quantity of their lands, the qualities, and values of the tithable matters and things they had yearly thereon; but insisted upon the payment of their tithes according to the said ancient *modus*es, and tendered the same.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon hearing counsel; and reading the defendants answers; and upon full debate of the matter; the court ordered the defendants to account for the value of the tithes of the several tithable matters and things demanded by the bill, with costs (b).

(b) *Torrano*, the rector of *Chingford*, filed another bill against *Faulst* and other inhabitants of the parish, claiming tithes as in the above suit; and the defendants insisted on the same *modus*es in lieu thereof; but on the 6th of *June* 1763, the court ordered them to pay their tithes in kind. It is said, that the *modus*es of 5 s. an acre for wheat; of 2 s. 6 d. an acre for other grain; of 2 s. 6 d. an acre for meadows mowed; of 1 s. 4 d. for upland grass grounds; and of 2 s. 6 d. for every farrow of pigs, were over-ruled, as being too rank, by approaching too near the real value of the tithes: that the *modus* of 4 d. for every orchard, in lieu of the tithes of all fruit trees in the parish, was over-ruled, because it was a *modus* of one tithe in lieu of another; but that if it had been, "in lieu of all orchards," or, "in lieu of the fruit growing in all orchards,"

Tr. 3 Geo. III. A. D. 1763. Scac.

Price v. Elvey; et à contra. [3 Wood's Decr. 63.]

BILL by the plaintiff, rector and vicar of the parish of *Lyming* and the hamlets of *Sandford* and *Puddlesworth* in the county of *Kent*, for an account of great and small tithes, taking up the demand of the account of great tithes from *Old Michaelmas* 1760.

The defendants admitted, that the plaintiff was rector and vicar of the said parish and hamlets; that they had, during the time mentioned, been inhabitants of the hamlet of *Sandford*, and had occupied lands therein; and stated, that for three years, ending the 10th of *October* 1759, they had severally paid several sums of money by way of composition in full satisfaction of all the great tithes due from them to the lessee of the great tithes; and that the defendant *Kennett* had paid his offerings, and 10s. for his tithe of hops of one acre; that the plaintiff had received the same for the year ending *Old Michaelmas* 1760; and that the plaintiff did not then demand any thing from them for any great tithes due before, but had given them receipts, dated the 28th of *October* 1760, for their tithes of corn. They set forth the particulars of the lands they occupied; and further stated, that they had been under a composition with the former vicar for the tithes thereof; that the plaintiff had continued to take the said composition, and had never given them notice to determine the same, except that he indorsed on his receipts, "Take notice, you are under no agreement with me for your vicarial tithes;" that this indorsement was not made until after the expiration of the year, and therefore was not sufficient to destroy the composition for the then running year; that neither the like notice nor any other was ever afterwards given; and that they therefore considered and insisted,

The defendants say, that they had paid their great tithes to the 10th *October* 1759;

that they were under a composition with the former vicar; that the present vicar had continued the same, and had not given them any notice that he intended to determine the same.

"chards," it might have been good; and that the *modus* of 9 d. a cow depastured on the meadows, and 6 d. a cow depastured on the uplands, in lieu of the tithes of all cows, calves, and milk, was also over-ruled; because, under this prescription, agistment tithes not being included, it is rather rank; but principally because, whether agisted cattle are included or not, the recompence is too loose and uncertain; for that the parson, in lieu of a certain right at common law, must have a right equally certain by the prescription; and in the present case, if a cow were depastured partly on the uplands and partly on the meadows, he would not know which *modus* to demand, or how to distinguish them. See *Terriano v. Legge*, 1 *Black. Rep.* 420.

that

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that the aforesaid agreement was still subsisting and in full force; but that if the court should be of a contrary opinion; and think the plaintiff entitled to an account of their small tithes, as prayed by the bill, he ought to pay the costs of the suit, he having never demanded any account of such small tithes before the bringing of his bill, or even intimated his intention of taking such tithes in kind; but that, on the contrary, by encouraging them to expect that he would make future agreements for compounding such small tithes, he had occasioned them to take the said tithes themselves; and thereby prevented them from paying the small tithes in kind, which, on receiving due notice to that effect, they would readily have done. They further stated, that the plaintiff, since his bill had been filed, had given them notice to pay their small tithes in kind from *Michaelmas Day* then last past; and that they had since set them out accordingly: but that the plaintiff had refused to accept the same, or to carry them away; and they set out the several lands, &c. by them occupied, and the quantities of the several tithable matters by them had thereon from *Old Michaelmas Day 1757* to *Old Michaelmas Day 1761*, and what they paid or offered to pay the plaintiff on account thereof.

The defend-
ants file a
cross-bill.

The defendants filed a cross-bill, stating, that the plaintiff, about *Michaelmas 1756*, was instituted into the said rectory; that they occupied lands therein in the hamlet of *Sandford*; that the plaintiff had granted a lease of the tithes to *Richard Marfb*, and had empowered him to compound for the great tithes, and to receive the same of the occupiers of lands there; that they had compounded with *Richard Marfb* for all their great tithes for three years, ending *1759*, at the following rates, viz. that *Elvey* should pay 4 s. an acre for wheat, and 3 s. an acre for lent corn; that *Kennett* should pay 7 l. a-year for one of his barns, and 2 l. a-year for the other; that the said compositions had been paid to the preceding rector; that they had also paid the same to the said *Richard Marfb*; that the rector took the management and receipt of the great tithes for the year *1760* into his own hands; and that he had received the same compositions from them for the year ending at *Old Michaelmas 1760*, without pretending that any thing was due to him for the three years preceding; and that he had given the plaintiffs several receipts as follow: "Received, *October 28, 1763*, of *Christopher Elvey*, 3 l. 13 s. 3 d. for eight acres of wheat, thirteen acres, three quarters of lent corn, one at 4 s. and the other at 3 s. by me, *R. Price*."—"Received, *October 1760*, of *Stephen Kennett*, 7 l.
for

for corn tithe of his own farm, and 2l. for the corn tithe of *Girmige Brook*." He therefore prayed, that the said payments made by them as a composition for the great tithes of the said four years, ending at *Michaelmas* 1760, might be established, in full satisfaction for such great tithes; and that they might be quieted from all further demands on account of such great tithes in the said years. 1763.

The rector admitted, that *Richard Marfb* had collected his tithes for the said years, and had accepted and received such compositions in full satisfaction of the great tithes for the said three years; and that he had received of them the like compositions for the year ending at *Old Michaelmas* 1760 in full for their great tithes, and had given them such receipts; and he said, that he had never demanded, or intended to demand, payment for the said great tithes a second time, nor did he mean to take any advantage of the manner in which his receipts were worded; but that the charges in his bill for an account of great tithes were inserted therein by mistake; that he had caused his bill to be amended in that respect, and had thereby waved his demand for corn tithes for the years ending at *Michaelmas* 1760; and he denied that he had ever pretended that they had not paid the same. He admitted, that *Richard Marfb* had power to make and receive such compositions for the great tithes for the said three years; that from what they had paid to him ending *Michaelmas* 1760, he discharged them from the same, and from all demands on that account, except the tithe of the hay, wood, and small tithes that had become due to him during the said years.

A replication was filed in the original cause, but not in the cross cause; and witnesses were examined on both sides in the original cause; and upon hearing counsel in both causes, and reading a receipt, dated the 20th of *October* 1757, and a notice indorsed thereon, signed *R. Price*; the proofs taken in the original cause; and on full debate; the court ordered the original bill to be dismissed with costs as to *Kennett*, touching the demand of hops for the year 1759; and the defendants in the original cause to account for the tithes of all the other tithable matters demanded by the said original bill, and also for *Easter* offerings, the plaintiff to have his taxed costs of this suit, except as to the demand of hops above-mentioned: subsequent costs and further directions to be reserved till after the report.

The court also ordered, that the plaintiffs in the cross-bill should have their costs of the said suit in the cross cause, to be taxed.

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Tr. 5 Geo. III. A. D. 1765. In Canc.

The *Attorney General* and *Blair* v. *Cholmley* and others.

An agree-
ment be-
tween an
incumbent
and his pa-
rishioners
for a certain
pecuniary
compensa-
tion in lieu
of tithes in
kind will
not bind his
successor,
though rati-
fied by a
decree in
equity.

HIS Majesty's Attorney General on behalf of his Majesty, as patron of the rectory, and at the relation of the plaintiff Dr. *Blair*, the rector of *Burton Coggles* in the county of *Leicester*, and the said plaintiff Dr. *Blair* in his own right, filed their bill in the court of Chancery against the defendant *Cholmley*, as proprietor of the lands in the parish, the defendants *Hopkinson* and *Nidd*, as tenants of part thereof, and the Bishop of *Lincoln*, as ordinary of the diocese, praying that a decree of the court of Chancery, confirming an agreement entered into between a former rector and some of the parishioners, by which the then rector had an inclosure and allotment, and a pecuniary compensation in lieu of glebe and tithes, might be declared nul and void (c), as against his Majesty and his successors, patrons of the said church, and the plaintiff Dr. *Blair*, and all future incumbents of the said rectory, and for an account of tithes become due to the plaintiff *Blair* since the 12th of *January* 1762, in respect of the lands in the occupation of the defendants, and that the plaintiff *Blair* might receive a full satisfaction for the same.

The defendants by their answer admitted, that the advowson, patronage, and right of presentation to the said rectory belonged to the crown, and that the plaintiff Dr. *Blair* was duly presented and instituted and inducted therein, and as rector became entitled to all the tithes within the parish payable to the rector; and admitted the ownership and occupation of lands within the parish, and that they had taken the tithes thereof to their own use since the said 12th of *January* 1762: but they insisted that the plaintiff, Dr. *Blair*, was not entitled to tithes in kind as claimed by the bill, for that by articles of agreement dated 21st of *January* 1664 made between *Montague Cholmley* esq. an ancestor of the defendant *Cholmley*, and *Henry Hall* esq. the then owners and proprietors of all the lands within the said town and parish of *Burton Coggles* of the one part, and *William Ayscough*, clerk, the then rector of the said rectory, of the other part; reciting among other things that there was a general

(c) *N. B.* In the information, as amended, the plaintiff submitted to abide by the agreement as far as respected the glebe.

inclosure

inclosure agreed upon and intended to be carried into execution, between the said parties, touching the field of *Burton Coggles*; and that sofarasmuch as the said parties had agreed, that a considerable part of the lordship should still be kept in tillage for the maintenance of husbandry, and had likewise agreed to better and advance as well the said rectory and yearly profits thereof and thereout arising to a considerable value over and above what the same had been theretofore yearly worth and let for, as well as their own lands; further reciting, that the glebe lands belonging to the said rectory did not consist of above 84 acres, and that the said rectory and glebe lands, with all manner of tithes thereto belonging, had not been let for above 100l. *per annum*; it was therefore agreed, and the said *Cholmley* and *Hall* did thereby covenant with the said *Ayscough* and his successors, that he should for ever thereafter enjoy the several parcels of ground therein particularly mentioned and by him chosen in lieu of the glebe lands formerly used with the said rectory, which several parcels of ground are therein-mentioned to contain 113 acres, one rood, and 36 perches, which were therein recited to be of far greater annual value than the said 84 acres of glebe; in consideration whereof the said *Montague Cholmley* did, for himself and his heirs, covenant with the said *Ayscough* and his successors, incumbents of the said rectory, to pay yearly to him and them the sum of 35l. 13s. in satisfaction of all tithes great and small, to grow due to the said *Ayscough* and his successor from the said *Cholmley* or any of his tenants in the said parish, (except as therein and herein-after mentioned), which sum was agreed to be charged upon the lands therein mentioned, and reputed to be of the yearly value of 50l. part of which sum, namely, 8s. 3d. was thereby agreed to be paid by the said *Cholmley* and his heirs, to the intent that the said *Ayscough* and his successors should pay tithes of a close therein mentioned, called *Pickworth Pasture*, to the parson or vicar of *Busingtonthrope*, within which the same lieth; And the said *Henry Hall* did thereby, for himself and his heirs, covenant in the like manner to pay the yearly sum of 44l. 15s. 3d. in satisfaction of all tithes due from him or his tenants, (except as therein and herein-after is mentioned), which sum of 44l. 15s. 3d. was agreed to be charged upon the lands therein mentioned and reputed of the yearly value of 55l.: and it was further agreed, that the said *Cholmley* and *Hall* should for ever thereafter enjoy such part of the glebe lands belonging to the said rectory, as should happen to be inclosed within any of the plots of ground newly inclosed within

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the said lordship and taken in by them respectively, without any claim to be thereto made by the said *Ayscough* or his successors, discharged from the payment of all tithes whatsoever (excepting and always reserving to the said *Ayscough* and his successors the benefit of all marriages, christenings, churchings, burials, and *Easter* offerings, thereafter happening within the said parish); and it was further agreed, that the said *Ayscough* and his successors should for ever thereafter be discharged of all constable lays, as well for repair of highways as otherwise, and of all duties and payments, as well to church as poor, except such poor as might thereafter fall upon the town by reason of persons inhabiting it, or the parsonage-house or cottage thereto belonging, which persons were at all times thereafter to be relieved by the said *Ayscough* and his successors.

That in pursuance of the said articles of agreement all the lands within the said parish were inclosed and enjoyed according to the said articles, and particularly the rectors of the said parish have ever since enjoyed the said 113 acres, one rood, and 36 perches, and the same were then enjoyed by the plaintiff *Blair*; that the sums of money agreed to be paid by the said *Cholmley* and *Hall* were received with the rents of the said 113 acres, one rood, and 36 perches, by the said *Ayscough*, and afterwards by *John Adamson* his successor in the said rectory, in lieu of all their tithes and former glebe lands till the year 1677; but that in the year 1677 *Adamson* declining to abide by the agreement, the said *Montague Cholmley*, together with the infant daughter and heirs of the said *Henry Hall* then deceased, exhibited a bill in the court of Chancery against *Thomas* the then Lord Bishop of *Lincoln*, within whose diocese the said parish of *Burton Coggles* lies, and against the said *John Adamson*, to carry the said articles of agreement into execution, and to be quieted in the possession of the lands against the claims of the said *Adamson*, otherwise than under the said articles, and that the said *Adamson*, by his answer, refused to perform the agreement unless the plaintiff in the said suit would agree to what he had proposed, which they or their agents had promised, *viz.* to add 16l. to the 80l. 8s. 3d. that is to say 7l. 1s. 10d. by the said *Montague Cholmley*, and 8l. 18s. 2d. by the said Mr. *Hall*, which if they consented to, and would secure the same on all the lands within the said rectory, he was willing the same should be confirmed by a decree; and that the same cause was heard upon the 2d of *July* 1677, when it was decreed, that the said articles should stand

ratified and confirmed, to be observed and performed by all the parties, plaintiffs and defendants, their heirs, successors, executors, administrators, and assigns; and it was thereby decreed according to the offer in the said defendant's answer, that over and beside the annual sum by the articles agreed to be paid by Mr. *Cholmley* in lieu of tithes, the said Mr. *Cholmley*, his heirs and assigns, his and their tenants, should pay the additional annual sum of 7l. 1s. 10d. being in all 42l. 15s. 2d.; that the same should be charged on all the lands of the said Mr. *Cholmley* within the parish; and that the said infant daughters and heirs of Mr. *Hall*, their heirs and assigns and their tenants, should pay in like manner the additional annual sum of 8l. 18s. 2d. being in all 53l. 13s. 5d.; and that the said plaintiff and defendant *Adamson*, their heirs, successors, and assigns, should for ever thereafter hold and enjoy the several parcels of lands allotted to them by the said articles, in lieu of their ancient lands and glebe, against each other, and against all other persons claiming under them or under the said *Henry Hall* deceased, according to the intent of the said articles; and that the plaintiffs in the said suit, their heirs and assigns, paying the said annual sums of 42l. 15s. 2d. and 53l. 13s. 5d. should stand discharged from the payment of all tithes according to the said articles. The defendants then said, that the annual payment of 96l. 8s. 3d. is not an adequate compensation for the tithes in kind of the parish; but insisted, that there were 29 acres, one rood, and 36 perches of glebe allotted to the rectory by the articles of agreement, in addition to the 84 acres of glebe before possessed by him; and that upon the whole the annual value of the rectory was much increased by means of the articles and decree: that neither the patron nor ordinary were parties to the agreement, and that neither his then Majesty, nor his Attorney General on his behalf, was a party to the suit, in which the said decree of 1677 was pronounced, but insisted, that the said articles and decree were binding on the plaintiff Dr. *Blair* and his successors.

The defendants by their answer insisted, in future bar to the plaintiff Dr. *Blair*'s claim of all manner of tithes in kind, that in *Hilary* term, in the third year of the reign of king *James* the first, *Thomas Bell*, the then rector, having instituted a suit in the spiritual court against *John Nix*, then a householder in the said parish, for subtraction of tithes, the said *Nix* applied to the court of King's Bench by way of prohibition, to restrain the said *Bell* from proceeding in the said suit; and that by the record of the prohibition

1765. it appears, that certain customary payments were due to the said *Bell*, as rector, in lieu of tithes in kind.

The plaintiff, the Lord Bishop, by his answer said, that he had no other concern in the matters in question, than as ordinary of the diocese, and submitted, whether the decree of 1677 was binding on his Majesty, the patron of the said rectory, as his then Majesty's Attorney General was no party to the said suit, and, consequently, had no opportunity of controverting the agreement in the said decree mentioned.

The answer of the defendants being replied to, and the cause being at issue, divers witnesses were examined, as well on the part of the defendants as of the plaintiff *Dr. Blair*.

The only matter upon which both the defendants and plaintiffs entered into proof, was to ascertain, from old terriers and surveys, the quantity of the glebe to which the rector was entitled before the articles of the agreement; and as to the quantity which he then enjoyed, on the one hand it was contended by the defendants, that the rector was, before the time of entering into the agreement, entitled only to 84 acres of glebe, and that upwards of 113 acres having been allotted to him by the articles, (of which they said the several rectors have been ever since in the possession); in that respect therefore the agreement was very beneficial to the rectors, and, consequently, to the patron. And on the other hand it was contended, by the plaintiff *Dr. Blair*, and proved from four different terriers, that the quantity of the glebe which the rector enjoyed, before the time of entering into the agreement, was above 102 acres, of which 84 acres, three roods, 13 perches, were arable, and 17 acres, two roods, 17 perches, were ancient inclosure, and a small part meadow, amounting in the whole to 102 acres, one rood, 30 perches, as also a right of common of two cow-gates, and 10 sheep-gates, annexed to an ancient cottage belonging to the rectory, which, with the right of common belonging to the original glebe lands of 102 acres, were fully equal to the 113 acres of the present glebe; and it appeared, that the mistake in the agreement, which mentions the whole quantity of ancient glebe lands as consisting only of 84 acres, upon which the defendants laid great stress, arose from the quantity of arable land only, being 84 acres and upwards, over and above the 17 acres, two roods, 17 perches, of ancient inclosure; for the fact seems to stand thus, that between the year 1649, and 1662, the dates of the two terriers, both being prior to the agreement of 1664, the then incumbent, *Mr. Ayscough*, made

made a private exchange of the 84 acres of arable land, which lay dispersed at the time in four fields, for the same quantity of acres of land in two fields, 80 of which in one field lay contiguous to the parsonage-house, and four in another at some distance: he also made another exchange of an old close of 11 acres, called *Acron Croft*, being within the parish, for a close called *Pickworth Pasture*, containing the same quantity of land, but adjoining to the other 80 acres, and lying in the parish of *Basingthorp*; and as this close was chargeable for tithe to the vicar of that parish, they agreed to pay the rector of *Burton Coggles*, a sum of 8s. 3d. annually, as an equivalent for discharging the tithes due to the said vicar of *Basingthorp*; so that at the time of the inclosure and agreement in *January 1664-5*, there clearly appeared to have been only an addition made to the glebe of about 10 or 11 acres, as a compensation for the rights of common belonging to the said glebe and cottage; and it likewise appeared, that the present glebe is exactly the same as that described in the two last terriers prior to the agreement, with the addition only of 11 acres for the said rights of common.

The cause came on to be heard before the Lord Chancellour upon the 15th of *May 1765*, and was argued upon that day, and the 17th of the same *May*; and upon the 17th of *June 1765*, his Lordship pronounced his judgement thereon as follows:

This is an information brought by the Attorney General, at the relation of *Dr. Blair*, for an account and payment of tithes in kind. The claim of the rector arises *de communi jure*. The defence set up against the claim, is, first, an agreement entered into in the year 1664 between the rector and the owners of the land in the parish for accepting a yearly sum of 80 l. in lieu of tithe. But I am of opinion, that the agreement on the face of it is unequal, as to the consideration thereby agreed to be paid to the rector; for it appears, that the agreement was entered into, in order to effectuate an inclosure of the open fields in the parish, and no consideration is given, as to the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit. But I am clear, that even if the agreement was equal, it would not bind the successor in the rectory, but would be void as against him.

The next defence set up against the plaintiff's claim, is a decree in 1677, which appears to be made in a cause instituted by consent between the same parties, that were parties to the agreement in

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1664 ; for as to the bishop of the diocese being a party, I consider him as set up merely for form. And it is material to observe, that the parties themselves did not consider the agreement which had been executed as binding on the rector ; for they considered the annuity of 14 l. as not being an adequate consideration for the rector's having given up his tithe in kind ; and therefore they entered into a new agreement, of allowing him an addition thereto of 16 l. 8 s. 7 d. a year ; and on being allowed that addition, the rector by his answer consents to have the agreement established. It is true, that the decree founded on this agreement doth *in verbis* bind the successors in the rectory ; but this was a decree founded on an agreement, which the court never enter into the propriety of when a bill is brought by consent of parties ; and all such decrees are drawn up by the Registrar of the court, in the words of the agreement, as a matter of course ; but I am of opinion, that such decree cannot bind the successor. The defendant's counsel have, it is true, cited cases of a similar nature, and urged the case of *Egerly* and *Price*, reported in *Finch's Reports*, which I have looked into, and think it a very extraordinary one, for the judge sent for the parties to attend him. I can pay no credit to that case, nor do I look on it as any authority, but only as the dream of some note-taker in this court.

The agreement and the decree being laid out of the case, the next consideration is, whether a court of equity can relieve in the present case ? and I am of opinion, there is not a better rule than *æquitas sequitur legem*. It is a fixed rule, that the church cannot be prescribed against ; first, on account of its high dignity ; secondly, on account of its imbecility, *quia fungitur vice minoris, conditionem suam meliorare potest, deteriorare nequit*. At common law, although the church could alienate, with consent of patron, parson, and ordinary, yet it was under various restrictions : the patron must be absolutely seised in fee simple : if he was seised only of a fee simple conditional, or base fee, the alienation was void. In the present case, the bar set up by the defendants amounts to a mode of alienation ; and if the decree is void, as I am of opinion it is, what then is there to send to law, when the point is about the extent of a decree of this court ? and if it was sent thither it must come back to be ultimately determined here.

It has been also objected, that the length of time ought in this case to bar the plaintiff ; but I think the legal rule, that no prescription can run against the church, must be adhered to ; and indeed

indeed the length of time, in which this agreement was acquiesced under, is not so great as at first sight it appears; for the person who was rector in 1677, and party to the decree, and had a right to establish the agreement during his life, did not die till the year 1718.

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Upon the whole, the inclosure of the lands was for the general benefit of the parish; and such lands will be continually increasing in value, while the composition given to the rector in lieu of tithes will be gradually diminishing in value. The composition here regarded only the value of the past tithes, without any regard to the future increasing value of tithes, which is always allowed for in every private bill for an inclosure. If, in the present case, the parties had made an allowance for the future improved value of tithes, I should not have been inclined to relieve, but would have left the rector to his legal remedy.

I shall therefore decree, that the information, as against the Bishop of *Lincoln*, be dismissed with costs; and let it be referred to the Master, to take an account of the value of the tithes which have accrued from the time of filing the information, and let what shall be coming on the balance of such accounts be paid to the relator *Dr. Blair*, and no costs hitherto; but I reserve the consideration of subsequent costs, till after the Master shall have made his report, and any of the parties shall be at liberty to apply to the court, as there shall be occasion.

From this judgement the defendants appealed to the House of Lords, and prayed a reversal of it for the following reasons :

6 Br. P. C.
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First, by the common law, the parson, patron, and ordinary might alienate the possessions of the church; and though the statute of the 13th of Queen *Elizabeth*, to prevent the impoverishment of succeeding incumbents, hath restrained this power; yet both the courts of Chancery and Exchequer have understood and expounded the act by a maxim of common law, *Ecclesia conditionem suam meliorare, non deteriorare potest*, and have been of opinion, that the legislature did not intend to prevent exchanges or bargains by which succeeding incumbents might be benefited. For there are still remaining upon the records of both courts many instances, both before and after the decree in question, of decrees establishing the like agreement against the several lay parties, their heirs, executors, and administrators, and against the incumbents and their successors

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successors (as this case is), none of which before the present were ever impeached by subsequent decrees of a court of equity; and this practice continued, until, by the frequency of parliament, it became more convenient to have such agreements established by the legislature. This practice cannot be accounted for, unless the great persons, who sat in both courts, had, upon the construction of the act of parliament, been of opinion, that it was not contrary to law, to establish such an agreement upon pregnant proof made, that it was for the benefit of the church: and to give the act of Queen *Elizabeth* at this time a different exposition, will not only contradict the opinions and acts of the judges of both courts, but in this case, disturb an uninterrupted, quiet enjoyment of lands and tithes for a century and upwards, and may have the like effect upon other parts of the kingdom.

Secondly, That the agreement in question was beneficial to the church, cannot be doubted, when the incumbent and the bishop both subscribe to the propriety of it in their answers; and the respondents have not now made any proof that it was otherwise.

Thirdly, However the question might be considered at law, yet in equity no agreement ought to be rescinded, without restoring the parties to their former condition: it ought to be rescinded in the whole, or not at all. By this decree, this agreement is rescinded in part, to the prejudice of the appellant Mr. *Chalmley*, to the amount of twenty-nine acres of land; for the decree, though it compels the appellants to account for their tithes in kind, leaves the respondent *Blair* the benefit of the statute of limitations to protect him in the possession of twenty-nine acres more than his ancient glebe amounted to. He that would have the assistance of a court of equity must do equity; and therefore the respondent ought not to have a decree for tithes in kind, but upon the terms of his yielding up the possession of the surplus glebe lands.

Fourthly, An account is decreed of the tithes in specie, notwithstanding the record in the King's Bench is an evidence of some weight, that the ancient mode of tithing in the parish before the decree of 1677, was according to the customs stated in that record; and therefore if the record is not to be taken as a decisive proof of the customs, yet it is a forcible ground for directing an inquiry touching such customs; for if it is barely probable, that all tithes were not payable in kind, it is unjust to decree it absolutely without inquiry.

Fifthly,

Fifthly, The decree in this cause is directly opposite to an enrolled decree of the same court, insisted upon by the appellants; which enrolled decree is by law binding and conclusive upon the persons named in it, until reversed by a superior judicature; and the respondent, being a successor in the rectory, is named in the decree as a person bound by it.

On the other hand, in support of the decree the respondents urged these reasons: First, the agreement of 1664, which is the original foundation of the appellants claim of exemption from the payment of tithes in kind, was confessedly entered into between the then owners of the lands within the parish, and the then rector only, therefore it could not bind any future incumbent of the rectory, as neither the patron nor ordinary were parties to it: and the agreement, upon the face of it, appears to have been founded either in fraud, mistake, or collusion; for it recites, that the glebe belonging to the rectory did not exceed eighty-four acres, though, by the respondents evidence, it appears, that the glebe did then consist of above one hundred and two acres, besides a very extensive and valuable right of common; the respondent's allotment therefore of one hundred and thirteen acres, was scarcely an equal exchange for the glebe and the right of common enjoyed by the rector before the agreement; therefore, it is insisted, that, as to the agreement, it is void, as against the respondents, either from the nature of it, as not being entered into by the proper and necessary parties; or, supposing it to be in that respect effectual, it must necessarily fail, as not being a fair and *bonâ fide* agreement, the compensation made by it to the rector, in lieu of his glebe and rectorial rights, not being just or adequate.

Secondly, The decree of 1677, confirming the agreement, with the variation as to the sums to be paid by each of the estates in lieu of tithes, meets with the same forcible objection in respect of the want of proper parties to the suit in which it was made, it being provided by the common law, that no right of the church shall at any time be alienated, without the consent of all parties, who can be in any sort interested in them, *viz.* the parson, patron, and ordinary. In this case the rectorial rights were all alienated and given up, and the patron (whose particular right; in respect of the value of the rectory, was materially affected by it) was no party, either to the agreement in the first instance, or to the decree by which the appellants contended, that the agreement

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was confirmed, and his right most essentially prejudiced. But this essential defect is greatly increased in the present case, when it is observed, that the patron is the King, whose right can never be legally taken away by collusion; and to this it may be added, that even a decree can add no strength to this illegal transaction, as it is particularly provided against by 13 *Eliz. c. 9. § 8.* where it is declared, that all judgements hereafter to be had for the intent to have or enjoy any lease contrary to the said statute, or any of them, shall be deemed void, in such sort as bonds and covenants are appointed to be void, which are made for that purpose; for by 14 *Eliz. c. 11.* all bonds, contracts, promises, and covenants, are declared to be of the same nature, to all intents and purposes, as leases, many evil-disposed persons having (as it is there cited) defeated the true meaning of the statute of 13 *Eliz. c. 20.* by asserting, that bonds and covenants were not in law taken to be leases.

Appellant's Objections answered.

First, It was insisted, that the defendant *Dr. Blair* ought not to have been permitted to set up his demand after an acquiescence by the crown as patron, and by the several rectors who have held the rectory ever since the making of the agreement and decree; and particularly after an acquiescence by the respondent *Blair* himself, from the end of the year 1756, when he was presented to the rectory, to the beginning of the year 1762, when the information was filed.

Acquiescence cannot be urged as an objection to the crown; and therefore, as the right of the crown in quality of patron of this rectory, will be materially prejudiced, if the decree of 1677 is to be considered as a bar to the respondent *Blair's* claim of tithes in kind, it may perhaps be unnecessary to give any answer, as to the acquiescence imputed to the respondent *Blair* and his several predecessors. But this objection, if admitted in its full force, will have but little weight when it is understood, that *Mr. Adamson*, the rector, who was party to the decree of 1677, and, consequently, bound by it, lived in the enjoyment of the rectory to the year 1718. *Mr. Dongworth*, who succeeded him, held it four years, only to the year 1722, and *Mr. Nicholson*, the next succeeding rector, enjoyed it from 1722 to 1728, only a space of six years. *Dr. White Kennet* held it from 1728 to 1740, and *Dr. Salter* from

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1746 to 1756; so that the respondent Dr. Blair, who cannot be considered as claiming under any of the former rectors, is answerable only for his own acquiescence, which was for a very short time, considering the difficulties he had to encounter in obtaining a thorough knowledge of the foundation of the appellants claim of exemption, against the united efforts of the whole parish, whose interest it very evidently appears to have been to prevent the respondent from acquiring that knowledge.

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First, The appellant contended, that the agreement cannot be rescinded in part, if not *in toto*.

It is true, that it is now impossible to restore the respondent Dr. Blair to the possession of all those rights which were enjoyed by the rector before the agreement was entered into, and therefore it was that the respondents by their information itself waved any relief, in respect of the glebe. But it is submitted, that the impossibility of doing the respondents complete justice can never be urged as a reason, why as much justice should not be done them as the present state of things will admit; and as that part of the agreement which regards the tithes, is totally distinct matter from that part of it relating to the glebe, the respondents may have the relief given them by the decree now appealed from, without disturbing or in the least interfering with the other part of the agreement respecting the glebe.

Thirdly, The last head of objection, made by the appellants, to the relief given to the respondents, by the decree appealed from, is the prohibition issued from the court of King's Bench in 3 *Ja.* 1. by which the appellants contend, that it appears the rector is not entitled to all manner of tithes in kind, but only to such tithable matters as are mentioned in the prohibition.

This objection will receive a full answer when it is considered, that no final judgement was ever pronounced in the suit in which the prohibition issued, and, consequently, the writ of prohibition itself can never be set up as a bar to the respondents claim of what is due by common right, and the defence arising under the prohibition is inconsistent with the recitals in the agreement upon which they rely, as the foundation of their claim of exemption.

The decree was affirmed.

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H. 6 Geo. III. A. D. 1766.

Clarke v. Stapler. [MS.]

Where a vicar is endowed with all small tithes, he is entitled to the tithes of the seed of artificial grasses, notwithstanding the impropriator may have been in the perception of that sort of tithe.
Howley v. Venables,
 H. 9 Geo. 3.
 3 Wood's
 Decr. 207.

THE vicar brought his bill for the tithe of clover-feed, rye-grass-feed, saintfoin-feed, and other grass-seeds, sown in the parish, insisting that they were small tithes.

The defendants, the occupiers, admitted, that the plaintiff was entitled, as vicar, to the small tithes in the parish, but insisted, that the seed of artificial grass was a great tithe, and due to and always received by the impropriator; and they stated the quantity of seed they had had in each year, and what they had paid to the defendant, the impropriator.

The defendant *Harvey*, the impropriator, denied the right of the vicar to the said tithe, or that the vicars ever received the same, for that he, the said defendant, and his predecessors had always received the same without interruption. He insisted, that, by the custom of the parish, whenever seed of artificial grass hath been suffered to stand for seed, it hath been always considered as grain, and, by the custom, when cut down sooner, hath been considered as hay.

All the defendants insisted, that from the time of the first introduction of such grass into this kingdom, the tithe of it had been always paid to the impropriator or his lessee.

The cause was two whole days in hearing. The court declared, (on reading the endowment of the vicarage and the proof in the cause), that the tithes of clover-feed, saintfoin-feed, and rye-grass-feed, are *small* tithes, and that the vicar is entitled thereto; and decreed, that the impropriator should refund to the vicar what he had received, and that the other defendants should account for what was still due from them.

P. 6 Geo. III. A. D. 1766. B. R.

Chave v. Peter Calmel Esq. [3 Burr. 1873.]

To a libel in the spiritual court for tithes, the occupier may plead a parol agreement with the parson's agent for the purchase of them, and a tender of the money; and if such plea be rejected, a prohibition will be granted.

SIR *Fletcher Norton* shewed cause against a prohibition to the consistorial court of the Bishop of *Exeter* to stay their proceeding in a cause instituted there for subduſion of tithes. The short of the case was (as it appeared to the court) that *Calmel*, the impropriator, had employed one *Finnimore* as his agent, to collect

the tithes, and a tender of the money; and if such plea be rejected, a prohibition will be granted.

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and compound for tithes. The plaintiff in prohibition (*Chave*, the occupier), had agreed with *Finnimore*, after the corn was cut and ready to be housed, for 5*l.* whereupon he housed his whole crop without setting out the tithes. *Chave's* agreement with *Finnimore* was only by parol. The impropiator libelled in the ecclesiastical court against *Chave* for not setting out his tithes. The defendant below, (*Chave*, the occupier), tendered the 5*l.*; and offered a plea "that he had purchased the tithes for 5*l.*" The ecclesiastical court rejected this plea.

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Mr. *Thurlow* and Mr. *Dunning* were for the rule.

The only question was, "Whether this was matter of appeal, or of prohibition?"

The court were unanimous in the latter opinion. And they founded it upon this rejection of the plea being a *gravamen irreparable*; and upon an apprehension "that the ecclesiastical court must have grounded their rejection upon a supposed difference between their law and ours;" that is to say, they took it for granted, that the ecclesiastical court were of opinion, agreeably to what is laid down by their favourite writer, *Gibson*, (who takes it from a note in (*d*) *Noy*—), "that an agreement with the agent of a proprietor of tithes will not bind the proprietor:" whereas, by our law, and in common sense and common justice, a composition by the occupier with the agent of the proprietor does bind and ought to bind his principal. Indeed, where the ecclesiastical court have jurisdiction, and proceed therein according to their law, where it does not differ from ours, the rejection of a plea would be matter of appeal. But, where the ecclesiastical law differs from the common law, and the ecclesiastical court would require greater proof from the defendant below, than the common law requires; or would esteem an agreement not to bind the impropiator, which at common law would bind him; there, an appeal could be of no service to the defendant in the ecclesiastical court; because the superior ecclesiastical court would equally adhere to their own law, as the inferior ecclesiastical court had done; and would determine alike, as being guided by the same principle of determination. Therefore, as the judges of this court supposed that in the present case the judge of the consistory court rejected the plea, because he thought the agreement with the agent not binding upon

(*d*) *Noy* 19. 2 *V. nt.* 48.

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Mr. *Carmel* the principal, which at common law did bind him, they held this to be matter of prohibition, and not of appeal. And though it had been observed, "that tithes lie in grant," yet they had no doubt that the occupier might, with sufficient propriety, be said to have purchased these tithes, notwithstanding the contract was only by parol. For, whatever might have been objected to its not being by deed, if this corn had been standing; or if it had been a sale by the proprietor of the tithes to a third person; yet the present case is by no means liable to such an objection: for the corn was here severed from the ground, and ready to be housed; and it was not a sale of the tithes by the proprietor to a stranger, but a composition between the proprietor and occupier, *pro hac vice tantum*. Rule for prohibition made absolute.

P. 6 Geo. III. A. D. 1766. B. R.

Butler v. Heathby. [3 Burr. 1891.]

A custom to give notice to the owner of tithes of setting them out is good. *Helyar v. Triff.* 3 Wood's Decr. 128. S. P.

THIS was an action upon the case against the defendant, for not fetching away his tithes in a reasonable time. The declaration states, that the plaintiff set out the tithes; and the defendant refused to fetch them away. At the trial, the defendant's counsel insisted on a custom in the parish, "That notice should be given to the owner of the tithes, of the setting them out." The proof of the custom was not entered into, at the trial: but the validity of the custom was discussed.

Mr. Justice *Gould*, who tried the cause, held the custom not to be a good one; and a verdict was found for the plaintiff, and 30 guineas damages; subject to the opinion of this court upon the following question—"Whether this custom be good in law or not?" A motion had been made for a new trial; and a rule to shew cause. It was argued on *Thursday* last, by Mr. Serjeant *Burland*, Mr. *Thurlowe*, and Mr. *Mansfield* on behalf of the plaintiff (the occupier); and by Mr. Serjeant *Davy* and Mr. *Dunning* for the defendant (the impropiator).

The counsel for the plaintiff denied this to be a good custom; 1st, Because it was only setting up the ecclesiastical law against the common law of the kingdom: 2dly, This cannot be done by custom in any particular district. The farmer is not bound by common law to give previous notice of the time of his setting out tithes.

M_c.

Mr. Justice *Wilmot*.—By the common law, no notice is necessary: by the ecclesiastical law, it is necessary. The question therefore is, “Whether the ecclesiastical law can be introduced, under the notion of such a custom.” This was agreed to be the question.

The plaintiff’s counsel objected, that this custom is not a reasonable or a good one; because it is not founded upon any consideration. And admitting the canon law to be as has been mentioned, yet it cannot be set up against the common law of the kingdom: at least, it ought to have been pleaded. It can be no bar to this action, or to the form of it. For, it is not alleged, “that these tithes were not fairly and honestly set out:” and if they were fairly and honestly set out, they ought to have been taken away by the impropriator. The farmer can receive no benefit by giving such notice: on the contrary, he may be much accommodated by being bound down to set them out the particular time notified. For he cannot carry any away, till he has set out the whole: and a lay-impropriator may reside out of the parish, and at a very great distance; or the farmer may not know to whom notice is to be given, or where; or have time sufficient to admit of giving such previous notice of setting them out. Indeed notice to the owner of the tithes, “of their having been set out,” is previously necessary to the bringing an action for not carrying them away. And this notice was given. But the defendant insists that there ought to have been previous notice “of setting them out.” *Bauer v. Spratley*, in *Bunb.* 333. is the only case to be met with, on such custom as this; and that case was never determined. Two judges against one, seemed to think “that it was bad.” The counsel for the defendant, who argued in support of the rule for a new trial, admitted “that the common law does not require the notice of setting them out:” but this custom does require it; and they insisted that it is a good custom. This custom falsifies the demand made by the declaration. For, the declaration alleges, “that the parishioner has been always used to set out the tithes so and so; and that he set them out in due manner; and the defendant neglected to take them away.” The defendant shews this custom; and that, for want of pursuing it, these tithes were not in due manner set out. And if they were not set out in due manner, then he was under no obligation to take them away. It is part of the definition of a custom, “that it differs from the common law.” We do not say, it is good, because it is agreeable to the canon law: we only say, “it is good, as being

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the *lex loci*." It is the law of the land here in this parish. The consideration of customs cannot be inquired into: however, if it were necessary to do so, honesty and piety are sufficient considerations for this custom. But customs must be presumed to have sprung from good considerations. This custom prevails in half the parishes in the west of *England*: and as tithes depend in a great measure upon custom, so also does the manner of setting them out. The parson cannot set them out himself: but by 2 *Ed. 6. c. 13. § 2.* he may come upon the land and see it done. And this statute directs tithes to be set out according to the customs of the respective parishes. The custom does not require the parson to be present; nor does it fix the tenant to reap his corn in bad weather: it is only a check against injustice being done to the parson. A reasonable notice is all that is requisite. If the custom should be abused, the tenant would be restrained from making an ill use of it. From *Hutton's* opinion to Lord Ch. J. *Lee's* time, and by *Godolphin* expressly, such previous notice of setting out is necessary by the ecclesiastical law. The case in *Bunbury* is an instance in support of the custom. There, indeed, personal notice was insisted on. But we do not require personal notice. We say, "to himself, agent, or servant." And it is his own fault, if he leaves the parish, and leaves no agent. In the cause at *nisi prius*, ——— v. *Yarborough*, at *Lincoln* assizes, Lord Ch. J. *Willes* held such a custom to be good; and said, He wished it was the law of the land. And it must be understood (in the present case) that this custom could have been proved.

Lord *Mansfield* said it had been very well argued. It depends upon general reasoning, and the case at *Lincoln*: for that in *Bunbury* does not ascertain any thing; it went off upon another point. We will think of it.

Mr. Justice *Wilmot* observed, that the canon law is no otherwise an argument in the present question, than as it may serve to shew that the custom has not been thought unreasonable. *Curia advisari vult.*

Lord *Mansfield* now delivered the opinion of the court. The only question is "whether this be a reasonable custom, or not?" There is no authority that comes up to this point, but one: and that was a cause on the *Midland* circuit before Lord Ch. J. *Willes*; who thought it a reasonable custom. I think so too. I believe the doubt about it arose from a jealousy of receiving the ecclesiastical law in any case whatsoever; lest the clergy should introduce

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it by degrees. It is reasonable, as promotive of justice and preventive of fraud. Mr. *Dunning* said, as of his own knowledge, "that there were such customs in the west of *England*:" and I am told there are such in *Lincolnshire* likewise. We are all clear "that it is a good custom." It is for the prevention of fraud and for the convenience of the parties. Therefore the rule must be made absolute for a new trial, but without costs. And I think it is such a custom that a very slight evidence would be sufficient to prove. Rule made absolute.

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Tr. 6 Geo. III. A. D. 1766. Scac.

Williams v. Baron. [3 Wood's Decr. 130.]

THE bill stated, that the plaintiff was presented to the rectory of *Saint Ewe* in the county of *Cornwall* fifteen years ago; that he had ever since been rector thereof, and was thereby entitled to the tithes of the said parish, and more particularly to all those personal tithes which had been accustomedly paid to his predecessors by all persons using any craft whereby they got gain, and residing with their families in the parish; that there were near the parish of *Saint Ewe* several fishing towns and coves, whence a great many boats and vessels were employed in the pilchard fishery; that the said fishery was carried on to great advantage on that part of the *English* coast, from the month of *July* to the month of *December* yearly; that the undertakers of the said fishery are called *Master Seynors*; that they or their agents, who generally reside in fishing towns and coves, had been used to hire several persons to work in the said fishery; that some of them were parishioners residing in the said fishing towns and coves; that others of them were parishioners residing with their families in several other parishes adjacent thereto; that the said *Master Seynors*, or their agent there, used to pay to each of them, for their work in the said fishery, such sums of money as they should mutually agree for, and to allow them, over and above the same, one half of the fish which should be caught during the season; that the several *Master Seynors*, at the proper season of the said fishery, had been accustomed to hire several of the parishioners of *Saint Ewe* (who with their families were resident there) to work for them in the said fishery,

A trial at law directed, Whether, when the inhabitants of the parish of *St. Ewe* are hired to work in or with the nets, boats, and other craft of the inhabitants of *Mevagilly*, in catching or taking pilchards and other fish in the sea, and are by contract respectively to have a sum of money, and also a share of the fish so caught for their work, and the fish which are so caught are brought into the parish of *Mevagilly*, the defendant, as vicar thereof, is

entitled to tithe in kind of such share of fish as aforesaid, in case the said nets, boats, and other craft used in catching such fish, are in the intervals of the fishing seasons stowed and kept in the parish of *Mevagilly*.

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The defendant *Baron* admitted, that the plaintiff was rector of *Saint Ewe*; that within four miles of the southern confines of *Saint Ewe*, no part of which extended to the sea shore as he believed, there were several fishing towns and coves, whence vessels were yearly employed in the pilchard fishery; that the undertakers of the said fishery hired, not only persons resident in the said fishing towns, but also other persons from neighbouring parishes, to work for them in the said fishery; that the usual terms were, that the owners of the nets, boats, and other craft, should have one half of the fish caught, and the men so hired the other half; but that as the men seldom had proper necessaries for curing their share of the fish, the same had been generally paid by the craft owners, who accounted with and paid the men one half of what such share sold for when cured. The defendant further said, that he had been vicar of *Mevagiffey* ever since the month of *July* 1755, and he insisted that he was, as such, entitled to tithes in kind of all fish caught in the sea and brought into and landed within the said parish by nets, boats, and other craft, which, in the intervals of the fishing season, were housed and kept in the said parish; but that as the receiving of such tithe-fish in kind must be attended with great trouble, a composition in money had been generally made and paid for the said tithe in manner following, *viz.* 1 l. 13 s. 4 d. for each seyne used therein, in lieu of the tithes of the craft-owners' moiety of the pilchards caught, and in lieu of the tithes of the men's moiety one penny out of every shilling the said moiety was sold for, after deducting the incidental expences. He further said, that at *Mevagiffey* the labouring part of the fishery had for many years past been chiefly done by the inhabitants there, but that when there were not sufficient men, the *Master Seynors* hired other men from the adjacent parishes, at such wages and on such terms as were mutually agreed on, but that it was generally known and understood by such strangers so hired, that the vicar of *Mevagiffey* was to be paid his tithes in kind, or the composition in lieu thereof. He further said, that he believed that it had been sometimes agreed that the men were to be paid their wages in money only, and at other times part in money and a greater or less share of fish, according to their skill or ability; that in the first case the craft-owners had paid the vicar one penny out of every shilling for which one half of the fresh or one quarter of the cured pilchards sold for; and that in the last case the craft-

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owners and the men had contributed proportionally towards making up and paying to the vicar one penny out of every shilling, which half of the fresh or one fourth of the cured pilchards sold for. He further said, that he believed that the vicar of *Mevagiffey* had never received or claimed, nor did he claim any thing for the tithe of the men's wages paid in money, but that such wages had been and were duly paid, without any deduction; and that if the tithe of such wages was due to the plaintiff, it was a different tithe from that claimed by and paid to the said defendant; and he said, that in his apprehension it was totally immaterial to him whether such tithe was due to the plaintiff or not, he, the said defendant, having received nothing but what he was entitled to by the custom of *Mevagiffey*, established by a decree of this court, or by virtue of such composition entered into in consequence thereof. He further said, that he knew nothing of the men who were hired to labour in the pilchard fishery, he wholly relying on his composition in money in lieu of tithe-fish which was retained by the craft-owners, and by them paid to him at the end of every fishing season, or so soon after as the accounts could be made up. He said, that he did not know whether any of the men employed in the said fishery were the plaintiff's parishioners or not, nor whether the inhabitants of *Saint Ewe* had paid or ought to pay him the tithe in the bill mentioned; nor did he know that any of the persons in the bill named had been hired in the pilchard fishery, or how or what they were to be paid for the same; or whether the tithe of their earnings ought to have been paid to the plaintiff, or whether the same amounted to, &c.; but he insisted that he had a right to receive all such money as had come to his hands for composition for the tithe of pilchards caught and brought into *Mevagiffey*; and that he was not indebted to the plaintiff for any money received by him for or on account of the said tithe-fish, but that he had a right to receive the same to his own use. He further said, that he believed that the undertakers in the pilchard fishery were owners of the nets, boats, and other craft for taking pilchards; that the *Master Seynors* are, for their greater skill in fishing, allowed by the undertakers greater wages in money; and that they command the other persons who labour in the fishery. He also said, that he did not know whether the undertakers or their agents deducted from the wages in money, or from the money allowed to the men for their share of the fish, being parishioners of *Saint Ewe*, the tenth or any other part of their gains, and paid them only nine tenths or any other part, under pretence that the

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had already paid the tenth part to him the defendant. He also said, that he disclaimed any right to tithe from that part of the gains of the persons employed in the fishery which consisted of money stipulated to be paid to them by the undertakers for their work and skill in the fishery. He insisted, that the vicars of *Mevagiffey*, time out of mind, had been, and that he, as vicar, then was well entitled to the tithe in kind of all fish caught in the sea brought to and landed in the parish by any person whatever, with nets, boats, and other craft, which, in the intervals of the fishing season, were housed and kept there, or to a satisfaction in lieu thereof; but he said, that he did not claim any other personal tithe from the parishioners of any other parish in respect of such fish, or of any gain made by them thereby.

The defendant *Smith* admitted, that the plaintiff was rector of *St. Ewe*, but denied that he was, to his knowledge, entitled to tithes arising from the labour of his parishioners employed in the pilchard fishery at *Mevagiffey*; and he said that he believed that he was not by custom so entitled, for that he yearly received offerings from them, which were paid, as he was informed, in lieu of personal tithes. The defendant spoke as to the custom of tithing the fish, and admitted, that, in the year 1760, he was master of a *seyne* at *Mevagiffey*; that two other of the defendants were hired to work the boats belonging thereto; and that the payments were made according to the custom set forth in the other defendants answers.

The other defendants, *Mayne* and others, being servants, put in their answers to the same effect as before mentioned, but hoped that they should not be obliged to pay tithe for the same thing both to the plaintiff and the defendant *Baron*; but they said, that they believed that the same belonged to the plaintiff as his right.

The plaintiff replied to the answers of *Baron* and *Smith*; they rejoined; and witnesses were examined on both sides; and upon hearing counsel for all parties on the 2d instant, and reading the answer of *Mayne* and others; an order made in this cause dated the 28th of *November* last, whereby the plaintiff was at liberty to examine *Mayne* and others, and to read their depositions at the Hearing, saving just exceptions to the defendants *Baron* and *Smith*; the deposition of the defendant *R. Mayne*, who had been examined pursuant to the said order; the depositions of the other defendants; several depositions of other witnesses taken in the said

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cause; and upon hearing counsel for defendant *Baron*, and on reading a decretal order of this court, dated the 4th day of *July* 1717, between *Woodridge*, then vicar of *Mevagiffey*, plaintiff, and *Hanna* and others, parishioners of the said parish, defendants; and after an objection had been taken to such reading thereof, and over-ruled by the court; and reading the depositions of several witnesses; the further consideration of this cause was adjourned over to the 9th instant, when the Barons declared they would give their opinion on a future day.

MS.

And now on this day, viz. 25th of *June* 1766, *Parker* C. B. spoke to the following effect:

The plaintiff by his bill demands a tenth part of the clear gains and earnings of his parishioners, which he claims by immemorial custom or otherwise: he proves his right to a twelfth part.

The defendant, Mr. *Baron*, insists upon a right to tithes in kind of all fish caught at sea, and landed in his parish by nets, boats, and craft housed and kept in his parish in the intervals of the fishing seasons; but says, that he has usually taken a composition of 1l. 13s. 4d. from the craft-owners for their half of the fish, and 1d. out of 1s. for the other half of the fish, deducting incidental expences.

This is a question between the ministers of these two parishes, whether, when the inhabitants of *St. Ewe* are hired by the inhabitants of *Mevagiffey* to work in the fishery, and are to be paid part in money, and also to have a share of the fish caught, the defendant *Baron* is entitled to tithe in kind of such share of fish. For if he is, he may make what composition he pleases for it.

A decree of this court in *Tr.* 1717, obtained by Mr. *Woodridge*, the then vicar of *Mevagiffey*, against *Hanna* and others his parishioners (c); and the depositions of several witnesses, that the craft-owners have deducted the composition from the parishioners of *St. Ewe's*, and paid it to the vicar of *Mevagiffey*, have been read in proof of the defendant's claim.

(c) In this suit the plaintiff insisted by his bill, that by custom and usage immemorial, the plaintiff and his predecessors had been endowed with, and the plaintiff ought to enjoy the tithes of all pilchards caught at sea, or brought into and cured in the parish of *Mevagiffey*, and of all other fish caught or brought into the said parish by way of merchandize, or for sale, or otherwise, in like manner as the plaintiff's predecessors. Decree, that the defendants shall respectively account for their several tithes in kind of all pilchards and other fish whatsoever caught at sea, and brought into the said parish, according to the value thereof.

On the contrary, it appears by the depositions of *John Wood* and *Richard Penever*, that after the decree and whilst *Mr. Wolridge* continued vicar, they for several years received money for their wages, and for their share of fish without any deduction for tithes: it appears also by the deposition of *Richard John*, that *Mr. Thompson*, the successor of *Mr. Wolridge*, when he had received money for the tithe of the share of fish which by contract belonged to the inhabitants of *St. Ewe*, he returned it, or paid it over to the plaintiff.

Tithe of fish taken in the sea is only due by custom. *Holland v. Heale*, *Noy* 108. *Anon. Cro. Car.* 264. And as tithe of fish taken in the sea is not due without custom; therefore a custom to pay less than the tenth part may be good. *Sheppard v. Penrose*, 1 *Lev.* 179. 1 *Sid.* 278. 2 *Keb.* 2. Personal tithe is the tenth of the clear gains of the parishioner. 2 *Inst.* 657. Tithe of fish taken in the sea is holden to be a personal tithe. 1 *Ro. Abr.* 656. *M. pl.* 2. And the eleventh section of the statute of 2 & 3 *E. 6. c.* 13. as it immediately follows the provision for personal tithes, seems to confirm this opinion. But, supposing for argument sake, that this be considered as a customary payment, in the nature, or in satisfaction of the personal tithes, according to that statute, which takes notice of the parishes upon and towards the sea coasts, the commodities and occupying whereof consist chiefly in fishing, and by reason thereof (as the statute speaks) have used to satisfy their tithes by fish, that is, by rendering a proportion of fish in specie in satisfaction of the tithes of their occupation; now, what is the occupation of these inhabitants of *St. Ewe*, but their perpetual work and labour in the fishery? and therefore I am of opinion, that whatever is paid or rendered in satisfaction of the tithes of their occupation ought to be paid to the parson of their own parish, and not the vicar of *Mevagissey*; for otherwise they will be liable to a double tithe or payment for their share of fish. The vicar of *Mevagissey* is undoubtedly entitled to tithes of fish caught or taken by the nets, boats, and inhabitants of his own parish, or some composition for them. But his claim of any benefit from the personal labour of the inhabitants of *St. Ewe* could, in my opinion, have no reasonable commencement; and his predecessors were so convinced of the unreasonableness of it, that one of them waved it after he had obtained a decree against his own parishioners, and the other returned, or paid over to the plaintiff, what he had inadvertently received.

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assistance for the ordering and reforming of the said person, according to the statute of 27 H. 8. c. 20. in that case made and provided, and confirmed by a statute of 2 & 3 E. 6. c. 13. : These are therefore in his Majesty's name, by virtue of the said statute, to will and require you or some of you, that you forthwith attach or cause to be attached the body of the said *James Owen* otherwise *Douaston*, and him deliver to the keeper of his Majesty's gaol for the said county of *Salop*, there to remain without bail or mainprize, until he shall have found sufficient surety to be bound by recognizance or otherwise before us or some other justice of the said county to the use of our sovereign lord the king, to give due obedience to the process, proceedings, decrees, and sentences of the ecclesiastical court of *Lichfield* aforesaid. Hereof fail not at your peril. Given under our hands and seals the 1st day of *May*, &c."

Sir *Fletcher Norton* and Mr. *Ajbburft* on behalf of the defendant, insisted, that this commitment was illegal; and took several objections to it: 1st, It professes to be grounded on 27 H. 8. c. 20. which statute is confirmed and enlarged by 2 & 3 E. 6. c. 13: and the 32 H. 8. c. 7. being made in *pari materiâ* must be taken in. The "contempt, contumacy, or disobedience," mentioned in the first of these statutes is explained by the second and third of them, to be a contempt or contumacy or disobedience after sentence. There never was an instance in the ecclesiastical court of a proceeding in this way, upon what may be called, *mesne process*. Their method is, to decree against the person; and after sentence, to excommunicate for contumacy in not obeying the sentence: and, if the party remains excommunicate for 40 days after publication, a writ *de excommunicato capiendo* is awarded against him. There is no instance in this court of such a proceeding upon the 27 H. 8. c. 20. as this is. None of the officers of the court remember such a return to a *habeas corpus*. And it appears by the fourth section of this act, that it was only meant to be temporary. The case of the *King v. Sanchee* and others (*f*), reported in 1 *Ld. Raym.* 323. and other

(*f*) In this case *Sanchee* and others, Quakers, were cited into the ecclesiastical court to answer there upon their solemn affirmation, concerning tithes with-holden by them from the parson of the parish; and for not answering the commissary, according to the statute of 27 H. 8. c. 20. certifies their contumacy to two justices of peace, by whose warrant they were seized and committed to prison; and being brought by *habeas corpus* into the King's Bench, Mr. *Robert Eyre* moved, that they might be discharged, because the new act (7 & 8 H. 3.) concerning the affirmation of Quakers, gives the parson a remedy

other books, was argued upon different principles: it was argued, that the jurisdiction of the spiritual court was taken away by 7 & 8 W. 3. c. 34. That case shews, that there has been a proceeding upon this act so lately as in king William's time; and the 27 H. 8. c. 20. was then considered as being in force. Yet in that case the statutes of 32 H. 8. and 2 & 3 E. 6. were not taken into consideration. If this method be legal, no writ *de excommunicato capiendo* will ever be applied for. If they can do it in this summary way, they need not stay 40 days required by 2 & 3 E. 6. c. 13. § 13. They observed, that Dr. Burn in his *Ecclesiastical Law*, vol. 2. p. 446. (under the words of 27 H. 8. c. 20. "shall have power to attach,") refers to the case of the *King v. Sanchee*, in 1 Ld. Raym. 323; but seems to have found no other case of the same kind.

2d, The information ought to have been upon oath. A man ought not to be deprived of his liberty without an oath. Whereas this commitment is founded upon the mere certificate of the ecclesiastical judge.

remedy to recover such tithes by distress, by virtue of a warrant of a justice of peace; then, where a statute gives remedy, the jurisdiction of the spiritual court is taken away, unless it be saved by the same statute, 5 Co. 73 b. Sir W. Jones. 320. And he cited several statutes where the jurisdiction of the spiritual court was saved, as 23 Eliz. c. 1. 1 Eliz. c. 2. In the same manner, in the statute against usury. 3 Inst. 152. 2 Inst. 657. And thence he inferred, that it was the opinion of those parliaments, that the spiritual jurisdiction would have been taken away by these acts, if it had not been saved by them.—But *per curiam*, this last act seems to be only an accumulative remedy, and not to repeal the act of H. 8. And in many cases the common law and ecclesiastical courts have a concurrent jurisdiction; as, if a pension be payable out of a parsonage by prescription, the remedy for this is either in the spiritual court, or annuity lies for it at common law; though Coke says the contrary in his 2 Inst. in his comment upon the statute *de circumspiciendis agatis*. But, where the nature of the offence is altered by a statute, and a new penalty inflicted; there, after the party has been tried at common law, and condemned, the ecclesiastical court shall not proceed against him: as, if a man be convicted at common law of having two wives, or have been adjudged the reputed father of a bastard child, &c.

But then Northey took exception to the return, because it is said, that *Sanchee, &c.* were imprisoned for contempt in a suit for detention of tithes or other ecclesiastical duties; and it ought to appear for which the suit was, specially. For though the statute which gives this remedy is in general words, yet in the return the cause of imprisonment ought to be certainly expressed, to the end that it may appear to the court, that it was an ecclesiastical duty for which they are imprisoned. And of this opinion was the whole court, and therefore the Quakers were discharged out of custody. S. C. 12 Mod. 155. Holt 657.

3d, Upon

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3d, Upon a writ *de excommunicato capiendo*, they must shew precisely, "that the ecclesiastical court has jurisdiction." Now this suit is only alleged to be for tithes and other ecclesiastical dues, which, they said, is not sufficient; and cited 1 *Ld. Raym.* 323.

4th, The justices ought to have convened the party before them, in order to have afforded him an opportunity of giving security: but, instead of that, he was carried directly to prison, without being permitted to give bail, (which, they said, was offered.)

5th, The certificate is improper, for want of reciting, "that the bishop was out of the diocese:" for otherwise the certificate ought to have been by the bishop.

6th, The certificate does not import to be a request. The jurisdiction of the justices cannot vest without an information and request: both are necessary. And no request shall be presumed. The certificate goes no further than that the man did not appear.

Mr. Moreton, contra, was stopped by—

Lord *Mansfield*, who declared himself to be very clear upon this matter. The statute of 27 *H. 8.* is not repealed. That statute, and the statutes of 32 *H. 8.* and 2 & 3 *E. 6.* are *diverso intuitu*: the latter do not mean to repeal the former. The officers of this court not remembering any instance in this court of such a return to a writ of *habeas corpus* is nothing at all. It is probable, that the person attached always gave bail, whenever any such case happened, and did not apply for a *habeas corpus* at all. As to the proceedings in the ecclesiastical court, there is no reason to complain of the manner in which the persons who claim the tithes have proceeded. They have chosen the easier, quicker, and cheaper method, instead of taking that which was the most vexatious, dilatory, and expensive. If the statute of 27 *H. 8.* is not repealed, then consider what is the construction of it. The contempt is in non-appearance to the suit instituted in the ecclesiastical court. The ecclesiastical judge has certified this under his seal of office, and hath desired the aid and assistance of the justices. It is objected, that here is no information upon oath. But why is there need of an information upon oath of the proceeding of a court? The ecclesiastical court are to make information and request; and then they are to have this assistance from the justices. As to the form, it is "in a certain cause of subtraction or non-payment of tithes, and other ecclesiastical rights and emoluments." This is said to be an uncertainty in the demand; and that it may perhaps be a
suit

suit for demands not within the jurisdiction of the ecclesiastical court. In the case of the *King v. Sanchez*, the court were in the right to lay hold of the nicest objections, circumstanced as that case was. But there, it was expressed in the disjunctive "tithes *or* other ecclesiastical duties:" this is "tithes *and* other, &c." So that it clearly appears, that the ecclesiastical court had jurisdiction in the present case as to the tithes. This seems a much better, easier, and shorter method than the other. This is only aailable process to appear and submit to the jurisdiction. It is a demand of a few shillings; and the man is no Quaker. Therefore he ought to be admitted to bail.

Yates J. concurred. As to information and request being both of them requisite; here, the justices acted merely ministerially. The contumacious person is to be attached, and to remain in ward until he shall find sufficient security. The act of 27 *H. 8.* ought to be taken disjunctively, "information *or* request." This act relates only to mesne process; and though the first words are "make information *and* request," yet in two subsequent parts of it, the words are "such information *or* request," in the disjunctive. This is a much shorter, easier, and better method of proceeding than that of excommunication: it does not harass or oppress, but only requires giving security. Here is an *express request* stated upon this return; though perhaps the ecclesiastical judge's mere sending the certificate might well enough be considered as a request to give the aid and assistance directed by the statute. It lay upon the party attached to offer his bail, if he had a mind to give any. Most clearly, the commitment is legal: the man must give bail.

Aston J. fully concurred *in omnibus* for the reasons already given. And as to the continuance of the act of 27 *H. 8.* the statute of 2 & 3 *E. 6.* expressly says, "That not only the said acts made in the said 27th and 32d years of the reign of the said late *Henry* the eighth, concerning the true payment of tithes, and every article and branch therein contained, shall abide and stand in their full strength and virtue; but also, be it further enacted, &c."

Hewitt J. expressed some doubt. He thought that the statute of 32 *H. 8.* seems to mean to give the same remedy to lay impropriators, which 27 *H. 8.* gave to ecclesiastical persons. Therefore it seems construable of 27 *H. 8.*; and, consequently, they should be both construed alike. The statute of 2 & 3 *E. 6.* § 13. says, that suits for withholding tithes shall be in the spiritual courts only; and

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and gives them power to excommunicate *after* sentence for not obeying their sentence. But 32 H. 8. does not give the same remedy which 27 H. 8. does; unless the former be construed agreeably to the latter: and the latter expressly says, that "*after* definitive sentence," such application may be made to the justices. (§ 4.) Therefore, he had some doubt, whether this is a proper proceeding under the 27 H. 8. as it is before a definitive sentence. He remarked also, that it did not very clearly appear, "that the parties dwelt in the county." Whereas the 27 H. 8. gives the jurisdiction only to two justices of the peace of the *shire where the offender dwelleth*. Again, the suit is only generally "for subtraction of tithes:" but it does not appear that these tithes arise *within the parish*, or were due to *Joseph Dixon*, as the *rector* of it. Whereas the power of convening the offender before the ordinary is given to the parson, vicar, curate, or other party aggrieved, and, consequently, so also is the remedy annexed to it, *viz.* the demanding the aid of the justices of peace. Therefore, he was not fully satisfied that the proceeding was to be defended under the statute 27 H. 8. and wished it might be further considered.

The court thereupon were about to order it to stand over upon Mr. J. *Hewitt's* doubts: but Sir F. *Norton* chose to give bail then; rather than risk being too late for a motion he intended to make against the justices for the manner of their acting in this affair. A recognizance was accordingly taken from the defendant with two sureties agreeably to the requisitions of the statute; the principal being bound in 5*l.* and each of the sureties in 50*s.* the value of the tithes being very small, not exceeding 15*s.* Whereupon the defendant was discharged out of custody.

H. 8 Geo. III. A. D. 1768. Scac.

Beaumont v. Shilcot.

Turnips
how tithable.

BILL by the vicar of *Framden* in *Suffolk* for the tithes (*inter al.*) of turnips.

The defendant in his answer said, that he had growing on his lands some turnips, which he severed and gave to his cattle, the tithes of which were first set out for the plaintiff by throwing out the tenth turnip, but that the plaintiff refused to take them away, because they were not set out in heaps; and that he, the defendant, thereby suffered greatly in his crop of barley which succeeded the turnips.

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The bill was dismissed, as to the turnips, with costs.

But though this was the event of the suit, yet we must not hastily consider this decree as establishing the manner of tithing insisted upon in the answer. For it should seem, that it is only where there is a paucity of turnips, (as, no doubt, from the terms of the answer there was in this case), that this mode of tithing is to be resorted to: but that, where the quantities are large enough to admit of its being done, the tithe of turnips must be set out in heaps. Such was certainly the opinion of three of the judges of the court upon this case, as will appear from the following note, the correctness of which cannot be questioned, for it comes from the pen of my Lord Kenyon.

“ The question was, in what manner the tithe of turnips was to be set out ?

Parker C. B.—The turnips ought to be set out in heaps; and the parson is to have every tenth heap. Setting them out by single turnips is liable to fraud, as there may be a great difference in the size.

Smythe B.—If there be a sufficient quantity to make ten heaps, the turnips should be set out in heaps. If only a small quantity be drawn, then the fair way is, though tithed by single turnips, to put every tenth in a heap. If the small turnips are put for the parson, it will be fraud.

Adams B.—The parson is to have the full and fair tenth. There is no particular rule yet laid down for setting out the tithe of turnips. The setting out single turnips is liable to great fraud. If a whole field, or whole acre be gathered at one time, they may well be set out in heaps: but, if only a few are gathered at a time, that method cannot be observed. In that case single turnips must be set out.

Perrott B. Absent.”

Tr. 8 Geo. III. A. D. 1768. Scac.

Gale v. Carpenter. [3 Wood’s Decr. 173.]

IN this case the defendants insisted upon the following moduses: 1st, That there was, and for time immemorial had been, a modus or certain customary payment of 2s. paid and payable by the occupiers of inclosed arable lands lying within *Corston Titbing* to the

Moduses of 2 s. an acre in lieu of the tithe of all grain reaped from the inclosed arable lands

in a hamlet, and 1 s. 6d. an acre for the tithes of the grain reaped on the common-field arable land, set aside as rank.

1768. owners or impropriators of the great tithes of the said tithing, their farmers or lessees, in lieu of the tithes of every acre of such arable land when sown with corn or grain; and that such modus was, and of right ought to be paid and payable on the 10th day of *October* in each year, when such inclosed arable lands were so sown with corn or grain. 2d, That there was, and for time immemorial had been, a modus or certain customary payment of 1 s. 6 d. paid and payable by the occupiers of common-field arable lands lying in *Corston Tithing* to the owners or impropriators of the great tithes of the said tithing, their farmers or lessees, in lieu of the tithes of every acre of such common-field arable lands when sown with corn or grain; and that such modus was, and of right ought to be paid and payable on the said 10th of *October* in each year the same were so sown with corn or grain.

The court were of opinion, that these moduses were rank; and decreed an account.

Tr. 8 Geo. III. A. D. 1768. Scac.

Boscawen D. D. v. Roberts. [3 Wood's Decr. 174.]

The dean of Burian, in Cornwall, claims the great and small tithes of the parishes of St. Levan and St. Sinnen, in the said deanery, in kind.

BILL by the plaintiff, as dean and rector of the free chapel and church of *St. Borian*, otherwise *Burian*, in the county of *Cornwall*, for an account of great and small tithes arising within the parishes of *St. Levan* and *Sinnen*.

The defendants say, that they had paid the great tithes; and that as to small tithes the following moduses: 1 s. a year for every bullock agisted, in lieu of agistment tithes of all barren and unprofitable cattle; 6 d. yearly for every cow, in lieu of tithe milk and calves;

The defendants *Roberts* and *Hodge* admitted the plaintiff's title, and that they were inhabitants in *Saint Levan*, within the said deanery and rectory; and averred, that they had duly paid for or set out their great tithes ever since the plaintiff became entitled thereto; but that, as to small tithes, that there was, and for time out of mind had been, a certain customary yearly payment of 1 s. at *Michaelmas* in every year by every occupier of lands within the said parish of *Saint Levan* to the said dean or rector for the time being, for every fat bullock agisted within the said parish, in lieu of the tithes of agistment of barren and unprofitable cattle agisted upon lands within the said parish: another customary yearly payment of 6 d. for every cow depastured within the said parish, at *Michaelmas* yearly, to the said dean and rector, for and in lieu of tithes of milk and calves; and the several ancient customary yearly payments for and in lieu of the several tithable matters following, that

is to say, for every lamb yeaned within the said parish, 2 d. in lieu of the tithe thereof; 1 d. for every fleece of wool shorn from every sheep fed and depastured therein, for and in lieu of the tithe of such wool yearly renewing therein; 2 d. for every colt foaled; 4 d. for every garden in lieu of garden stuff; 4 d. for potatoes tilled in a ridge in the field for family use and not for sale; 1 d. for any small quantity of hemp sown every year by every occupier of lands within the said parish; which several customary payments were due and payable at *Michaelmas* in every year; and also that, for time beyond memory, 2 d. was due and payable, at *Easter* in every year, for every inhabitant of the age of sixteen years and upwards. They also said, that they knew not that any tithes had ever been paid for hens, ducks, ducklings, chickens, turnips, or any kind of garden stuff, or any other tithes, except for honey, pigs, and geese, which had been taken and paid in kind for the most part when they amounted to a tithable number, but that when they fell short of that, there was a customary payment of 1 d. for every pig and three halfpence for every goose, paid and payable at *Michaelmas* yearly within the said parish, for and in lieu of the tithe of pigs and geese which did not amount to such tithable number as aforesaid.

The defendant *Williams* and *Frere* also admitted the plaintiff's right under the said letters patent to the said deanery and rectory, and to all great and small tithes accustomed to be paid, or to such ancient customary payments as had been paid time out of mind; and after stating that they had paid all their great tithes since they had been inhabitants of *Sinnen*, they insisted on the said moduses as stated in the other defendants answer, and put in the like answer.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon hearing counsel; and reading the proofs taken in the cause; and on debate of the matter; the court declared, that the modus of 1 s. for every fat bullock agisted within the said several parishes, in lieu of the tithes of agistment of all barren and unprofitable cattle agisted upon lands within the said parish; and the modus of 1 d. for any small quantity of hemp sown within the said several parishes are severally bad in point of law; and ordered the Deputy Remembrancer to take an account of what was due to the plaintiff from the defendants respectively for the tithe of agistment of all barren and unprofitable cattle fed and agisted by the defendants on the lands by them respectively occu-

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2 d. a lamb;
1 d. a fleece;
2 d. a colt;
4 d. a garden;
4 d. for potatoes ridged for private use;

1 d. for any small quantity of hemp;

2 d. for *Easter* offerings;

nothing for poultry;

honey, pigs, and geese, in kind, except under 10, and then 1 d. a pig and $\frac{1}{2}$ a goose.

The same moduses insisted on in the parish of *St. Sinnen*.

The cause heard.

The moduses as to bullocks and hemp declared to be illegal and void.

The other moduses directed to be received.

1768. pied within the said several parishes; and also for the tithe of hemp which had grown on their said lands respectively from the commencement of the time in the bill mentioned; and also to take an account of what was due to the plaintiff from the defendants respectively for the several other moduses in their said several answers mentioned, according to the said moduses, during the time aforesaid; and that the said several accounts should be taken with costs of this suit to the time of filing the replication; the said costs to be taxed by the said Deputy Remembrancer; and to be paid by the defendants to the plaintiff.

Costs. But, as the plaintiff had proceeded to the examination of witnesses upon the whole of his case without accepting the moduses last above mentioned, which were tendered to him by the defendants in their answers, and which had been by them proved in evidence in this cause in their favour, it was ordered, that there should be no costs received or paid on either side in respect of such examination, and the depositions of witnesses taken thereupon, and of every other expence incurred in consequence of such examination.

M. 9 Geo. III. A. D. 1768. Scac.

Willis v. Harvey.

Horton v. Guldard,
3 Wood's
Decr. 151.
S. P. Ryder
v. Gould,
Sc. C. 15
June 1752,
S. P. but
this decree
is not entered.
Robinson v. Tunstall,
2 Wood's
Decr. 426.
S. P. Smith
v. Johnston. *Supra* 606. S. P.

IN this case the court declared, that the plaintiff, as vicar of *Holbeach* in *Lincolnshire*, was entitled by virtue of his endowment to the tithes of the agistment of all sheep kept and depastured on the lands in the parish from the time they were last sheared until they were sold off fat, or taken out of the parish for sale, or any other purpose, before the next shearing time.

By the endowment, the Bishop of *Lincoln*, as impropriate rector, was entitled to the tithe of corn, hay, wool, lamb, and flax *duntaxat; cætera quæcunque quandocunque quotiescunque accidunt, pertineant ad portionem vicarii.*

M. 9 Geo. III. A. D. 1768. C. B.

Lord Mansfield v. Clarke. [5 Durnf. & East. 264. notes.]

THIS was an action upon 2 & 3 E. 6. c. 13. for not setting out tithes. There was a verdict for the plaintiff, and on a motion for a new trial the opinion of the court was delivered by

Lord C. J. *Wilmst.*—In this case there are many difficulties that occur to us, and it must go back to be tried again. The declaration only states that tithes have been paid for 40 years before the making of the act, but there is no averment that tithes were payable, and of right ought to be paid, which is the case of all the declarations I have seen; and none of them rest on the payment only. There was no evidence of tithes ever having been paid at all, and that is a presumption that there was no payment for 40 years before the statute; and then the evidence does not prove the declaration: but, if the declaration had said, that tithes ought to be paid, another kind of evidence might have been given: therefore, it would be proper to amend the declaration to bring the merits before the court. This seems to be a necessary averment; for the counsel for the plaintiff say, if tithes were not paid for 40 years before the statute, yet they ought to have been paid of common right, and that would have been sufficient. But it seems to us that that cannot be the true construction of the act, for then you make the last clause signify nothing, and that the 40 years are immaterial. But it may come out, that tithes within that statute must mean that they were paid within 40 years, or you must account why they were not paid; and then it would fall within the usual way of pleading that they are payable. I do not mean to give any positive opinion, but only to suggest the reasons of the court why this case should be further considered. If tithes have never been paid, and no reason can be given why they never were, it will be open to another consideration. It is settled that you cannot prescribe in *non decimando* against a lay-impropriator any more than a priest; but, though that is so settled, yet it is likewise settled in *Rotheram v. Fanshawe*, that in case of a lay-impropriator the case is open to evidence of presumption of severances from the rectory, and so exempt, as by a grant from the lay-impropriator. I am aware this is the case of a college, and they are disabled from

Where a declaration on the statute of 2 & 3 E. 6. c. 13. only stated that tithes had been yielded and paid 40 years before the statute, and there was no evidence of their ever having been paid at all; it was holden that the plaintiff could not recover.

1768. making a grant by 13 *Eliz.* but before that time they were at liberty to make such grants; and therefore if it appear that this land has never paid, and has been constantly ploughed, it will be open to presumption of a grant. There might be some private disabling statutes of this college before the disabling statute that prevented them from aliening for more than a particular term: for though the disabling statute of *Elizabeth* gave a power of making leases for particular terms, yet it never meant to enable colleges to make longer leases than their private statutes warranted, where they were limited by them. If there are no statutes (as I am informed there are not) then the case will be left open to presumption (g).

(g) The above report of this case was taken from a note of Mr. Justice *Buller*. The following account of it I have met with in the hand-writing of a very correct and laborious Judge, whose name I am not at liberty to mention.—In Lord *Mansfield* and *Clarke*, F. 8 Geo. 3. C. B. it was held by *Wilmot* C. J. *Clive* and *Bathurst*, on a case reserved *ex am Bathurst* at the last *York* assizes, (but without any doubt of his) that the words, “as they have been paid within 40 years before the act,” ought to be construed, “before the commencement of the action.” It was so holden by *Willes* C. J. in *Alden-terre v. Stokes*, at the Summer Assizes at *Stafford* 1745; which being cited in *Fanfare v. Rogers* before Lord *Northampton* in Chancery, Mr. *Pratt* and Mr. *Yorke*, the attorney and solicitor general, and the bar, agreed it the right construction: the plaintiff to pay the costs of the nonsuit. *Ex relatione servientis Fester*. J. *Gould* was absent, but afterwards told me, that this case remained undetermined. *Bedle v. Sherman, Co. Entr.* 161. *Cro. Eliz.* 608, 613. *Mo.* 912. The court granted a new trial, and the Chief Justice, *Clive*, and *Bathurst*, retracted their first opinion, and *Gould* J. agreed with them. And C. J. *Wilmot* delivered the opinion of the court in *M. 9 Geo. 3.* 1768, and said, that there was no colour to change the words of the act, from 40 years before passing it, to 40 years before the bringing of the action: but upon the trial upon an amended declaration, by inserting, or of right or custom ought to have been paid, the non-payment, as far as the memory of man can reach, will be evidence of a non-payment 40 years before the statute; and then the question upon the trial will be, whether such a non-payment will not put the plaintiff upon shewing, that they ought of right to have been paid during that space of 40 years, not by saying, that tithes are due of common right, and therefore ought to have been paid, but by shewing such a reason for their non-payment during the 40 years, as a temporary composition or lease, (*Dobies v. Courteen*, 2 *Cro.* 453.) which removes any presumption of a legal discharge which runs with the land.

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* *Charry v. Garland.*

Dorchester Assizes, coram *Ward* C. B. 8 Mar. 1699. [MS. *Ex relatione Petri nuper Domini King.*]

DEBT for tithes of hay and corn. *Nil debet* pleaded. The evidence given by the defendant was, that there was a modus: whereupon the plaintiff was nonsuited.

* Tr. 1 Geo. II. A. D. 1727. B. R.

Boughton v. Hufster. [MS. *Ex relatione Cap. Just. Lee.*]

SUIT in the spiritual court for tithes of loppings of trees. The defendant by his answer in that court had alleged, that the trees were above 20 years growth, and therefore not tithable; after which he moved in B. R. for a prohibition, suggesting the matter contained in his answer in the spiritual court, with an affidavit of the truth of it.

Per Cur. Denied a prohibition, for the party should have pleaded this matter in the spiritual court, and have produced an affidavit that that court had refused to receive such plea. 2 *Ld. Raym.* 835. *Far.* 137. 2 *Inst.* 643.

* H. 1 Geo. II. A. D. 1728. B. R.

Mason v. Hine. [MS.]

SIX shillings and eight-pence paid for every yard of land for tithes held a good modus, though the lands are uncertain.

* H. 9 Geo. II. A. D. 1735. Scac.

Whieldon, Impropiator of the Rectory of *Cauldron*, v. *Harvey* and others. [MS.]

A BILL for all tithes great and small. The defendant insisted on the payment of a modus to the parson or curate. On the Hearing it was insisted upon by the counsel for the defendants, that the plaintiff, being a lay-impropiator, ought not only to prove himself impropiator, but also the receipt of tithes in time of memory.

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memory. For, though, through indulgence to rectors, it has been established that *nullum tempus occurrit regi aut ecclesiæ*, yet that rule does not extend to lay-impropriators.

Reynolds C. B. Carter and Thompson B. clearly held, that a lay-impropriator was entitled to all the favourable presumptions which a rector is, both with respect to time and exemptions; and if he proves himself impropriator, it will lie on the defendants to prove their *modus* or exemption.

The *modus* in this case is bad, because it is in the disjunctive “to the parson *or* curate,” and because any payment to the curate can be no bar to the impropriator.

* Tr. 28 Geo. II. A. D. 1755. Scac.

Jennings v. Lettis. [MS.]

PARKER C. B. (b)—This is a bill by the impropriator of the rectory of *Barkway* in the county of *Hertford* for the subtraction of tithes.

The defendant by his answer says, that he believes the plaintiff is entitled to the greatest part of the rectory, but not to the whole rectory; for that as to 119 acres of arable land, and 32 acres of heath ground, adjoining thereto, he says, they were always, since his knowledge of them, reputed to be, and are, he believes, by some means, freed or discharged from the payment of tithes, or otherwise the tithes have been many years since granted to the owners of the land by the impropriators of the rectory impropriate, since the tithes were made lay fees about 200 years ago; and according to his knowledge or belief no tithes were paid for the same or any part thereof within the memory of man to the impropriator of the rectory of *Barkway*, or his lessees or farmers for the time being: that although the original means or foundation of such

(4) This judgement was delivered on a re-hearing of the cause. On the former Hearing the court offered the defendant *Lettis* an issue to try, whether the lands in question were within the parish of *Barkway*, or the tithable places thereof, in the 32d year of H. 8. when the act of parliament passed for erecting the town of *Reydon* into a parish. But the defendant declining to accept that offer, the court decreed an account, with costs.

Upon that Hearing, the defendant's counsel objected, that *E. Chester, Lettis's* landlord, ought to have been made a party to the suit; but that objection was over-ruled. 2 Wod's Decr. 481.

discharge

discharge or grant might be lost by length of time, yet as a composition in lands, or other satisfaction, might have been given to the rector before the dissolution of monasteries, or the said tithes might have been alienated for a valuable consideration by those under whom the plaintiff claimed, the constant uninterrupted non-payment thereof to the impropiators of the rectory, and the receipts given by the occupiers of the lands as far as the memory of man could go back, would be evidence of such discharge or alienation; and therefore he insisted, that the plaintiff was not, as impropiator of part of the parish of *Barkway*, to have any tithes for the said lands, especially as his, the defendant's father had taken the said lands as free and exempted from the payment of tithes to the impropiator, and had on that account paid an extraordinary rent for the same. The defendant further said, that he believed that so much of the said rectory as the former owner thereof was entitled to, had been purchased by the plaintiff's father; and that at the time of such purchase, the vendor, or those under whom he claimed, had sold the same freed and discharged of the said tithes, and of course that he had not paid any value for the same. He also said, that no demand had ever been made for tithes of the said lands within the memory of man, except by the plaintiff; and he insisted, that after so great length of time it ought to be presumed that the lands were exempt from the payment of tithes by some grant thereof, especially as the landlord thereof was then lord of the manor of *Roysson*, and those under whom he claimed had been so for many years, and entitled to the tithes of the lands within the said manor, of which the aforesaid acres were parcel, and the tithes had for many generations belonged to the family of the *Chesters*, and been conveyed by fines and deeds by *E. Chester* the then landlord; and he insisted on those settlements, fines, and non-claims as a bar to preclude the plaintiff of his pretended right to the said tithes; and averred, that he held no other lands in the parish of *Barkway*, except as aforesaid.

On the part of the plaintiff, there has been read in evidence a conveyance in fee of 16th October 1659, from *Ellis Crispe* and *Mary* his wife to Sir *Edward Chester* of the rectory and parsonage impropriate of *Barkway*, and of the manor and lordship called, the Rectory, Manor, and Lordship of *Barkway*, for the consideration of 1,400l. and he has derived his title under it. Having done that, he relied on his common law right as rector, but made no proof of possession or enjoyment.

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On the part of the defendant, several deeds, fines, and recoveries have been read; and likewise the depositions of several witnesses; the effect of which I shall presently consider.

The first question is, whether the defendant *Lettis* can prescribe in *non decimando* against the plaintiff, a lay-imptopriator. It is admitted, that he cannot so prescribe against an ecclesiastical rector: but there is no difference between an ecclesiastical and a lay rector; because every imptopriator derives his title under an ecclesiastical body; and if the defendant could not have prescribed against an ecclesiastical body before the dissolution of religious houses, he cannot do it here, because a prescription could have no legal commencement since the dissolution of those houses. Bishop of *Winchester's* case, (*supra* 167.) *Slade v. Drake*, (*supra* 385.) *Chapman v. Monson*, (*supra* 679.) *Corporation of Bury v. Evans*, (*supra* 757.) *Shaller v. Pennyfather*, 21st February 1707, (1 *Wood's* Decr. 506.) and *Fanshaw v. More*, (*supra* 780.)

And as to the observation made upon some of the cases cited, that they were *in favore ecclesie*; I think it but a bad compliment to the memory of the judges who determined those cases, and were famous for their learning and integrity, to imagine that they would overturn legal exemptions contrary to law and their oath, merely for the sake of advancing the revenues of the church. But it is unnecessary for me to dwell longer on this point: if any one desires more satisfaction, I shall refer him to Lord Chief Baron *Comyns's* argument in the case of *The Corporation of Bury v. Evans*, already cited.

The second question is, whether the defendant has shewn any title in Mr. *Chester*, his landlord, to the particular tithes which he claims?

And I will now consider the effect of the settlements, deeds, fines, and recoveries, and of the depositions of the witnesses, which have been read as evidence for the defendant.

And first, as to the deed of 1615, which is said to be evidence of a severance of the tithes from the rectory. It is a covenant, that Sir Robert *Chester* and his son should levy a fine of tithes (among other general words), and that the conuzecs in the fine should stand seised of all the tithes and tenths of corn in *Mill-field*, alias *Ellfield*, and in *Claypit field*, then in the occupation of *Leonard Hammond*. Sir Robert *Chester* did not execute this deed, though it was his estate; but the other parties only executed it. If indeed
he

he had executed it, no fine appears to have been levied, and then no uses could arise. *Hole v. Cockerill*, 3 Lev. 126. *Barrington v. Crane*, id. 306. Nor is there any evidence to shew that the tithes were then in the occupation of *Leonard Hammond*, so that this deed could have no operation at all, and, consequently, could not make any severance.

The survey of 1610, which is the next piece of evidence, mentions "Priory land in *Barkway Field* in the said county of *Hertford*, without the liberty and sheep-walk of the said priory, yet tithe-free." But what this priory land was, or whether any of the land for which tithe is demanded, does not appear. It mentions also, "eight acres parcel of the demesne of the said manor," then in the occupation of *William Thurgan*, formerly demised to *Robert Murley* for 200 years, together with the tithes thereof lying together in one piece in *Barkway Field*, with particular abuttings and boundings as by the lease thereof appeareth." The jury of the manor have nothing to do to enquire of tithes.

These eight acres and the tithes are the same which are mentioned in the deed of assignment of 10th February 1696, (which is next produced) from *William Thurgan* to *Sir Giles Allington*. But the defendant has not by evidence applied the tithes of these eight acres to any of the tithes demanded by the bill, and in this respect he fails in making out his landlord's title.

Hitherto, there does not appear to be any severance of the tithes in question from the rectory. In 1659, *Sir Edward Chester* purchased the rectory from *Crispe* and his wife. He might, if he had pleased, have given his grandson *Edward Chester* the tithes as well as the lands, which the defendant's landlord claims under him. But what does he do? By his will in 1660, he gives to his son *Edward* by a second venter, all his right to the manor, rectory, and parsonage of *Barkway*, which he lately purchased of *Crispe* and his wife. And by his will he takes notice, that he had settled his manor of *Reyston*, and divers other lands and hereditaments in trustees in fee. But the deed by which *Sir Edward* made this settlement is not produced: and this is another instance of a defect in the defendant's landlord's title. By the deed of 10th August 1671, *Robert Edes* and the other trustees, reciting that *Edward Chester*, son and heir of *John*, had conveyed the C. estate to *Edward Chester* the second son of *Sir Edward Chester*, convey to *Edward Chester* the younger, the manor of *Reyston*, lands, tenements, and hereditaments, which they were required to convey to him

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him by the will of Sir *Edward Chester*. Though the words are comprehensive enough to pass tithes, yet the word "tithes" would never have been omitted out of this conveyance, if Sir *Edward* had intended that his grandson *Edward Chester* should have the tithes.

But it is objected by the defendant's counsel, that the tithes in question were severed from the rectory antecedently to Sir *Edward Chester*'s purchase in 1659, and if so, they did not reunite upon the purchase; and they cited *Skin. 192. 6 Mod. 151.* "If lands be once severed from a manor, they can never after become parcel of it in reality, though they may in reputation. The reason is, that a manor, must be time out of mind, and cannot be created at this day." Although Sir *Edward Chester* had both the rectory and lands, the unity of possession would not extinguish them, but they would remain *in esse*, 11 Co. 14 a. And I do not see why they may not reunite to the rectory; though I can find no authority that they will do so. But the true answer is, that the defendant's evidence shews no severance of the tithes in question at the time of Sir *Edward Chester*'s purchasing the rectory; which will be also an answer to another objection, that such part of the rectory only passed to Sir *Edward Chester*'s son *Edward*, as he purchased from *Crispe* and his wife, and so these tithes not appearing to be then severed would well pass by the will.

I shall now state the rest of the defendant's evidence, because the observations I shall make upon it will go to the whole of it.

1st November 1700. Deed to make a tenant to the *præcipe*, from *Robert Chester* to *Joseph Biscoe* of the manor of *Royston*, and (among other things) of tithes of the said *Robert Chester* in *Royston*, which premises *Edward Chester* by indenture of release purporting to be a marriage settlement, bearing date 8th November 1671, and made or intended to be made between *Edward Chester* the younger, and *Frances Gough* and the trustees, conveyed to the uses therein mentioned. But the settlement of 1671 is not produced, and what tithes the recital alludes to is quite in the dark.

Mich. 12 W. 3. A fine of all and all manner of tithes of corn, grain, and hay, arising out of the manor of *Royston*, and Mr. *Chester*'s lands in *Royston*.

16 Jun. 1702. A settlement by *Robert Chester* esq. on *Catherine Davies* of the manor of *Royston* and of these tithes.

16 Oct. 1720. A deed to make a tenant to the *præcipe* of those tithes.

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Mich. 14 Geo. 2. A fine of these tithes, and in the same term a recovery of them.

4 May 1734. A settlement of these tithes on the present Mr. *Chester's* marriage.

13 Mar. 1699. A lease from Sir *Charles Cleaver* and *Dame Frances* his wife, and *Robert Chester* her son, to *George Lettis*, of a tenement and lands in *Mill-field* and *Claypit-field*, and also of all tithes of corn and grain arising on 26 acres and a half of arable land lying dispersedly in the parish and fields of *Royston*; eight acres part thereof in the possession of *James Wortham*; 14 and a half acres, other part thereof, in the tenure of *Ralph Fletton*; and four acres, residue thereof, in the tenure of *Samuel Chandler* (except a piece of *Claypit-hill*) for the term of 21 years.

12 Jun. 1728. Counterpart of a lease of the same tithes from *Robert Chester* to *George Lettis*, except the tithes of arable land in the possession of *Henry Rutherford*.

By the depositions of the witnesses, it appears that no tithes arising within the manor and parish of *Royston* have been paid to the impropiator of *Barkway*; that two parcels of land are reputed free and exempt from tithes; and that defendant *Lettis's* father and grandfather have for 40 years and upwards taken tithes or a composition for Mr. *Wortham's* eight acres.

What is the amount of all this evidence? Some of Mr. *Chester's* ancestors have assumed a power over what they had not, and granted these tithes without shewing a previous conveyance from some person who had a right to the rectory or to these tithes.

But it is then insisted upon, that from these deeds and the non-payment of tithes, a legal exemption or alienation is to be presumed. But this is so far from making out an exemption or title in the defendant's landlord to these tithes, that it brings the case back to a direct *non-decimando*. And the instrument or deed of exemption or alienation or discharge ought to be produced.

But it is then objected, shall a man be liable to pay tithes, if he loses his deed of discharge or alienation, so as not to be able to give any legal evidence of it? I am afraid he will. But the hardship will be the same in the case of a spiritual rector as of a lay-impropiator; and yet it seems to be admitted that in such a case the parishioner could not defend himself against the demand of the spiritual rector. And since this has been the established rule of law ever since the case of *Slade and Drake*, it imports persons who have such instruments to preserve them by enrollment. And this rule of law is

1768. founded on the maxim, "Better a partial mischief than a general inconvenience;" it being more reasonable that some owners or occupiers of lands which are really discharged, or the tithes of which have been alienated, but the exemptions or alienations are lost or destroyed, should be subjected to the payment of tithes in a few instances, than that a general inconvenience should be introduced, by putting difficulties on impropiators in the recovery of their tithes, or raising presumptions of exemptions or alienations against common right.

It is next objected, that the plaintiff's right to these tithes is barred by the fines and non-claim.

To work a bar, the conuzees ought to have had the freehold of the tithes in them, which they had not; *partes finis nihil habuerunt*, the rectory being in those, under whom the plaintiff claims, at the time of levying the fines. But according to this reasoning, if a man shall withdraw his tithes, levy a fine of them, and five years pass, the impropiator will be barred, which would be very inconvenient. Every prescription supposes the loss of some deed; but, if the presumption from long possession and enjoyment will not work a good discharge of tithes, how can it give a title to tithes? There seems to be as much reason to produce the deed to make out the title to tithes, as to discharge them.

As to Mr. *Wortham's* eight acres, of which tithes in perannuity have been taken by defendant *Lettis's* father and grandfather, as lessees of Mr. *Chester* and his ancestors: I suppose, that there is a proper grant of those tithes: but the tithes of those lands are not now in question; nor will it follow, that because Mr. *Chester* has a title to the tithes of Mr. *Wortham's* lands, that he has a title to the tithes of the other lands.

The last question is, whether tithes being made lay fees by the statute of 32 H. 8. c. 7. and the defendant having litigated the plaintiff's right to these tithes, the court can properly decree an account upon the present bill? or, whether it ought not to have directed some issue, or have left the plaintiff to his remedy at law?

By 32 H. 8. c. 7. § 2. all persons are required to set out their tithes, and if they do not, they may be sued in the ecclesiastical court for withdrawing them. By § 7. tithes are made lay fees, and if persons having any estate of inheritance in them be disseised thereof, they may have remedy in the temporal courts by *precipe quod*

quod reddet, assise of novel disseisin, &c. and fines and recoveries may be levied and suffered of them. Section 8. provides, that the act shall not extend, nor be expounded to give any remedy, cause of action or suit in the courts temporal against any person or persons which shall refuse or deny to set out his tithes, or, which shall detain or with-hold them; but that in all such cases the person or party, ecclesiastical or lay, shall have remedy in the spiritual court according to that act and not otherwise. This is enforced by the statute of 2 & 3 E. 6. c. 13. In 1 *Inst.* 159 a. Lord Coke says, "Tithes in the hands of laymen are temporal inheritances, and shall be accounted assets, and husbands shall be tenants by the courtesy of them, and wives endowed of them, and they shall have other incidents belonging to temporal inheritances, only this ecclesiastical quality they have, that the owner or possessor thereof may sue for the subtraction of the same in the ecclesiastical court." Besides, it seems that *Royson* was one of the lesser abbies; and by the statute of 27 H. 8. c. 28. § 2. patentees shall have all such actions, suits, entries, and remedies, to all intents and purposes, as the abbots, priors, &c. ought to have had, if there had been no suppression. And this court has a concurrent jurisdiction with the ecclesiastical court for subtraction of tithes.

Though the defendant by his answer insists that his landlord has a title to these tithes, I think he has made out no such title.

The same objection to the court's decreeing in this case an account on a bill for subtraction of tithes, would hold in all the cases where a discharge or alienation of tithes from the rectory has been insisted upon; and yet the court has decreed an account in numberless such instances.

The non-payment of these tithes to the plaintiff, and those under whom he claims, is to raise a presumption in favour of the defendant: and granting by family settlements, and levying fines and suffering recoveries of them, is to strengthen that presumption. But still, the defendant's case rests upon presumption, and will not give his landlord any title to the tithes: and turn his case in your thoughts as much as you please, it will come to be no more than a *non-decimandus*. The defendant ought to have shewn the instrument or deed of discharge or alienation; and not having done so, he has failed in his defence.

For these reasons I am of opinion that the decree is right, and ought to be affirmed.

H. 9 Geo. III. A. D. 1769. Scac.

Hulse v. Munk. [3 Wood's Decr. 211.]

Moduses set
aside for
rankness.

THE defendant insisted upon two moduses, the one of 4s. for every acre of wheat, and the other of 2s. for every acre of lent corn reaped within the rectory of *Appledore* in *Kent*. The court declared them to be rank.

Kington v. Clarke.

Salp Summer Assizes 1769, *coram Yates J.* [5 Durnf. & East. 265. notes.]

IN an action on the statute for not setting out tithes, *Yates J.* in summing up to the jury, said, that the same evidence was admissible in this, though a penal statute, as to proof of title, as if it had been in ejectment: and therefore, as men's deeds and evidences were liable to be lost, he should consider a length of possession and perception of the tithes as sufficient title. But yet, as tithes properly lay in grant, he should consider twenty or thirty years possession as very weak evidence of title unaccompanied by deeds; but in the present case the plaintiff produced deeds for near a century past in which *tithe-bay* was conveyed; which he held sufficient evidence. And he said, in an action of this kind he thought it necessary to prove perception of tithe in kind within 40 years before action brought, analogous to the reasoning of the legislature at the time of making the act; which mentions, that in order to entitle the plaintiff to the action, the tithe must have been paid within 40 years before the making of the act.

The defendant proved a payment of 1s. 6d. for about 50 years back; and it appeared that the value of the tithe would not at most have amounted to above 18s. *per annum* at this day. This, he said, favoured of a rank modus, and looked more like a conventional payment: for if it were taken as a modus, it must have subsisted time out of mind, which was as far back as the time of *Richard* the first; and at that time 1s. 6d. was as much as 18s. are at this day, and therefore must have been the full value of the tithes.

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And he thought that this was the only legal action for the trial of right to tithes. He thought it a fair way of trying it, wherever they had been paid within 20 or 30 years; if they had not, he thought it would be hard to subject the party to a penalty which included in the idea of it a wilful and criminal default.

The plaintiff had a verdict; and the finding was 4 s. for the single value of the tithes (not by way of damages) leaving it to the court to treble it (*i*).

M. 10 Geo. III. A. D. 1769. Scac.

Erskine v. Ruffle and Brewster.

THE bill stated, that the plaintiff was collated, instituted, and inducted into the parish church of *Wickham Saint Paul* in the county of *Essex*, and by virtue thereof had become entitled to receive the tithes of corn, grain, hay, wool, lambs, and other tithes, as well great as small, arising therein; that the defendants for some time past had occupied several farms and lands therein, and had arising and growing thereon corn, grain, hay, and other tithable matters, the tithe of which they had refused to pay; that the defendants had compounded with him for his tithes for three years ending at *Michaelmas* 1765; that he had since pretended to set forth the tithes of milk, eggs, wood, pigeons, &c. but had set forth the same illegally; that the defendants had kept cows and sheep, which had calves, milk, lambs, and wool; that they had also sows which had pigs; that they kept poultry, which had produced young ones and eggs; that they had topt and lopt several pollards and other trees, and had made a number of faggots, brush-wood, and other wood thereout, which they had burnt and disposed of; that they had cut various fields of corn at various times, and set out the tithe corn in sheaves and not in treaves, as they ought to have done; and that they had subtracted the tithes of all the said matters and things, and had refused to make him any satisfaction for the same. The bill therefore prayed, that the defendants might account for all and every the said tithes, and pay the true and just value thereof; and that the plaintiff's right to the same might be established.

(i) Mr. Justice *Buller*, from whose manuscripts this report was taken, thought it rather a loose note, and not much to be depended upon.

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The defendants admitted the plaintiff's title, and that he was inducted into the said rectory about *May 1762*, and was entitled to the tithes of all corn, grain, hay, wool, lambs, and all the tithes, great and small, tenths, offerings, and other dues and duties arising therein.

The defendant *Ruffle* said, that he had ever since *February 1763* occupied *Wickham Hull Farm*, and *Rowls Crofts Farm*, and had several tithable matters thereon, the tithes whereof in kind the plaintiff would have been entitled to, but that he compounded with him at 8 l. 10 s. *per annum*, for all his tithes, great and small; that he had paid the same to *Michaelmas 1765*; and that therefore the plaintiff was not entitled to a discovery of tithes during that time; that from *Michaelmas 1765* to *Michaelmas 1766*, they had reaped, cut, and mowed corn, grain, and hay from off the said lands, but that, as they had duly set out the tithes thereof for the plaintiff to take away, if he had so minded, they had not kept any account thereof; that he had, during the said time, kept and depastured on his said lands twenty cows, from which he had seventeen calves; that the plaintiff had two of them for the tithes, which were more than he was entitled to; and that a full and fair tenth of the milk during that year was duly set out for tithes, and the plaintiff took it away; that he also kept and depastured thereon seven score of wether sheep and ewes, and two rams; that he had from the said ewes eighty-four lambs; that he rendered eight of the said lambs for tithes, which the plaintiff fetched away; and that he had paid 2 s. 6 d. as a satisfaction for the tithe of the remaining four lambs, which was more than the tenth of their value; that he did not set out his tithe-wool in kind, as they had agreed that it should be sold, and that the plaintiff should receive the tenth part of the money, which he accordingly received; that he had also kept some sows, which had two farrows; that the plaintiff had a pig of each farrow for the tithe; that he also had a pigeon-house from which he had several dozens of pigeons, but that, as they were generally eaten and spent in his family, he did not pay to the plaintiff the tithes thereof; that he had poultry, fruit, garden stuff, and wood, for which he paid the plaintiff the full tenth part; that he had cropped many pollards and bolling trees, but that he did not set out the tithes thereof because they were consumed in his house as fuel.

And the defendant further said, that it has always been the usual and customary method for the farmers in that neighbourhood

to begin and proceed to cut and get in their corn from time to time, as was convenient for them, and as the weather permitted, and to set out the tithes of what corn they cut from time to time, without waiting till the whole crop in the field was cut down; and they insisted, that the plaintiff ought to comply with such customary method; because, if the farmers were to wait till such field was cut down, the corn in general must necessarily be many days exposed (after being fit to be carried) and thereby remain liable to all the hazard and uncertainty of the weather; by which means the corn would be in danger of being spoiled or greatly damaged; and in a wet and unsettled season, in case a whole field was to be cut down before any part of the corn was to be tithed and carried, if the same did not happen to be a very small field, all the corn must almost always be spoiled: for in inclosed wood-land fields, if wheat gets wet after being cut and bound up in the sheaf, every sheaf must be opened again in order to be dried, which takes up a considerable time, in regard the wind has not the same power of drying in inclosed fields as it has in the lands in open countries: and when the corn is once wet after being fit and ready to be carried into the barn, if it does not quickly get dry again, the kernels are apt to grow and shoot out, and the corn then becomes bad and unfit for sale. And the defendants further said, that they apprehended and believed it can never be worth the farmer's while to begin to carry corn out of the field, until there is such a quantity cut down, as will make the tithe thereof worth sending for; and that it is seldom the practice to begin to carry the corn out of the field until there is such or a much larger quantity cut down, unless it be in very wet unsettled weather, when it is for the benefit of the rector or owner of the tithes for the time being, as well as of the farmer, to catch and take hold of every opportunity of carrying and getting in the corn. And the defendant *Ruffle* said, that on the 15th and 16th days of *August* 1766, he cut down some more wheat in the field called *Waggons Leys*, about the quantity of five acres, and left it lying on the gather or gavel, and not tied up in sheaves, because it was too wet; and if the same had been tied up in sheaves, it must have been untied and opened again, or have been entirely spoiled: that to the best of his recollection the plaintiff and some of his servants did between the 11th and 18th days of the said month of *August* tell the defendant, that the plaintiff would not accept the sheaves laid out by him for the tithe; that they were not set out in a legal manner, and that the plaintiff would not

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concern himself with them. And the defendant *Ruffle* further said, that after the sheaves were cut and bound up, and he wanted to have them gathered in in readiness for loading or treaving (whether of the two was or should be judged most suitable to the condition the corn was then in) his usual way was to send a boy to gather the sheaves, and leave them with the straw-end to the straw-end, in some places seven opposite to seven, in others nine opposite to seven or eight, but, generally, as near as well could be, an equal number on each side, that is, on one ridge seven, and upon the next ridge seven opposite the other, and so leave only the furrow between each straw-end; and in some places the sheaves were laid in parcels in unequal numbers opposite to one another on two ridges with spaces between them from one end of the land to the other end; in other places there were sixty or more laid together for treaving or loading; in other places forty or more; in others twenty or more; and in others twelve sheaves or more; the gathering and collecting in the sheaves together in these unequal numbers being always according as the sheaves happened to lie the most convenient for their being collected together; and the sheaves being so collected together for treaving or loading, (as was judged most suitable), the gatherer or collector-in of the sheaves knows nothing of the sheaf that may happen to be the tithe-sheaf; and when the sheaves were gathered together in the manner aforesaid, then came the defendant's three men and tithed them, beginning at the right-hand side of the gathered sheaves, and ending on the left, by separating every tenth sheaf by the land from the other nine parts, and telling the sheaves as they separated them, and taking and throwing aside every tenth for the tithe, as it happened to come in course, of whatever size the sheaf might happen to be, whether great, middling, or small; and when there happen to be any number of sheaves above ten, and under twenty at a place (which frequently happened) then that quantity of sheaves was accounted and reckoned to the next parcel of sheaves, in order to be separated and tithed as before; so that at some places there were two sheaves or more laid out for the tithe; at others three; and at some other places more; the same being according to the quantity of sheaves at a place.

And the defendant *Ruffle* further said, that the tithes of all his barley and oats in the field called, *Lampitt Field*, and his other fields, as well in those where the plaintiff did accept his tithes, as in those where he would not accept them, were set out by the swarth, save only in such places where the swarths happened to lie

lie uneven by being blown about by the wind, or any other means, or when some of the parts of the field happened to be of an unequal length or of an irregular figure; and then the tithes were set out by measuring the length and breadth of the swarths or of the ridges whereon the same lay, with a poll, and apportioning the tenth part of the corn for the plaintiff; and when in setting out every tenth swarth the defendant's servants came near to the side of the field, and the number of the swarths remaining was under ten, such number was also measured by the poll, and the tenth part apportioned for the plaintiff's tithe: that this is the usual and customary method, and is as fair and just a way of apportioning the tenth part of the corn as can possibly be used. The defendant further insisted, that cocking or shocking soft corn was never practised by the farmer within the said parish or the country about it; and that the fairest and most unexceptionable way of tithing such corn was by setting out every tenth swarth.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon hearing counsel several days; and reading the proofs in the cause; the plaintiff's counsel objected to the reading any evidence taken in this cause relating to the custom of tithing in other parishes, and the court allowed the objection.

And the cause standing for the opinion of the Barons, *Parker C. B.* on the 16th of *November 1769*, said,

(*k*) There is no particular custom in this parish as to the manner of tithing corn and grain, the tithe thereof having been taken in kind but once in fifty years, by a *Mr. Pemberton*, a former rector. And the principal question is, whether, according to the law of the land, a whole field must be cut down before any part of it can be tithed. And though my late brother *Clarke*, in the case of *Atton v. King and Smith* in this court in *Hilary* term 1748, declared, that he had often heard it said by this court, and particularly by *Baron Price*, that where part of a field is only cut, it cannot be

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(*k*) This report of Lord Chief Baron *Parker's* argument is in many parts imperfect, and the application of the law he lays down to the facts of the case is not always shewn: The manuscript from which it was taken purporting to be no more than notes of the judgement which was delivered. But, as several parts of this very important judgement appear with sufficient clearness, in these notes, I have ventured to insert them.

1769. regularly tithed, but the whole field ought to be cut before the parishioner begins to tithe; and so it is of lands in a common-field belonging to different parishioners, the parishioner cannot cut half a land and tithe it, but must cut the whole land before he begins to tithe: and in the case of *Mather v. Holmwood*, 13th December 1765, (*supra*), this notion was adopted by three of us in the absence of my brother *Adams*, (probably by me from my brother *Clarke's* reports); yet I cannot find, that there is any decree produced in which any such declaration was made by the court; and if this doctrine was to prevail in its utmost latitude, it would be extremely inconvenient and prejudicial both to the clergy, lay impropiators, and the parishioners. And though the plaintiff's counsel contend, that this is the general rule of tithing; yet, where the field is sown with the same or with different sorts of corn or grain, and it is ripe at different times, or in case of catching weather, these are exceptions out of the general rule. As to the particular quantity of tithe to be set out, it is variable according to circumstances: but, in general, a reasonable quantity ought to be set out; enough, at least, for a load, where the size of the field will admit of it: if it will not, the tithe of the whole field ought to be set out: but this upon the supposition that the corn is equally ripe.

But it is absolutely necessary, and particularly required by the statute of 2 & 3 E. 6. c. 13. that the tithingman may have an opportunity of seeing that the tithe is fairly set out. And to that effect are the cases of *Wilson v. Bishop of Carlisle*, *Hob.* 107. (and *supra* 279.) and *Boughton v. Wright*, *Bunb.* 186. (and *supra* 658.)

Corn tithable in the sheaf.

It seems to be very clear that corn is regularly tithable in the sheaf. In *Wilkins's Anglo-Saxon Laws*, p. 198. it is said, *De omni annonâ decima garba Deo debita est, et ideo reddenda*. So in *Ledgar v. Langly*, 1 *Sid.* 285. tithe of corn or grain is to be paid in the sheaf; and if it be the tenth sick or stook, that is by custom, and may be laid in discharge of other tithes, as rakings, &c. In *Bennet v. Shortwright*, *Cro. Eliz.* 206. 2 *Leon.* 107. upon a suggestion, that they had used in the parish to pay the tenth sheaf in satisfaction of all tithes for corn to the parson, and that the plaintiff set them out, and the parson had them; a prohibition was granted. In *Bird v. Adams*, *Sav.* 100. *Moore* 278. the tenth sheaf is the usual and common course of tithing corn. In *Latch.* 226

a custom

a custom to be discharged of the tithes of odd sheaves, because the parishioners usually took the pains to make the sheaves into shocks, is good. In *Lamb v. Tatterfall* in this court after *Michaelmas* 1742, (*supra* 778.) it was agreed by the bench and the bar, that tithes of corn of common right shall be paid in the sheaf and not in the shock; for if it is in the shock, it is by custom.

As to the barley and oats, it is insisted upon for the defendant, that the tithing of barley and oats by the swarth is a good manner of tithing. But nothing is said in any printed book of authority, nor has any manuscript case or decree of this or any other court been produced for tithing barley or oats in the swarth. The case of *Green v. Hunt*, *Cro. Eliz.* 702. (and *supra* 215.) indeed was cited, where, in a prohibition for suing for the tithes of rakings of barley, a prescription was alleged, to make the barley into *cocks*, and to pay the tenth cock in satisfaction of the tithes of the barley, and of rakings *minus voluntariè* dispersed. Demurrer, because not averred, that the rakings were not *minus voluntariè* dispersed. But all the court held, that the prescription was good, and there needed not any averment; but that ought to come from the other side if they would. But the true reason was, that no tithes were payable for in voluntary rakings. And I am of opinion, that barley and oats (called in the pleadings and proofs *soft corn*) ought of common right to be tithed in cocks, and that tithing them by the swarth ought not to be admitted contrary to the method of tithing settled by law. Indeed in counties, as in *Cornwall* (mentioned by Mr. *Huffey*), where barley and oats are reaped and bound up in sheaves, they of necessity must be tithed in the sheaf according to the custom of those counties. In *Bird v. Adams*, *More* 278. it is holden, that the tenth sheaf of corn or cock of barley or other grain, is not a satisfaction for more than it is the tithe of. So *Saunders v. Paramour*, 1 *Ro. Abr.* 650. pl. 11. Again, *Woodshaw v. Hill*, *Tr. 2 & 3 Geo. 2. C. B.* in which I was of counsel for the plaintiff at the assizes. "It was an action on the case by the plaintiff, an occupier of land in the parish of *Higb Offley* in the county of *Stafford*, against the defendant, the lessee of the tithe there, for not taking away his tithes, but suffering them to continue on the plaintiff's ground to his damage; and a custom was set out, that every occupier of land used to collect the corn into cocks for the greater convenience of carriage, and to set out every eleventh cock of the barley, peas, vetches and oats, with which the ground had been sown after the cutting thereof, which it was alleged the plaintiff

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Barley and
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had done, but the defendant would not carry it away after due notice, whereby the plaintiff was damnified. There was a verdict for the plaintiff at the *Lent* assizes preceding, and the defendant moved in arrest of judgement. The question upon shewing cause was, whether there was more done by the plaintiff, than he was obliged to do of common right, so as to raise such a consideration, that the defendant should be entitled to no more than the eleventh cock instead of the tenth. It was urged, that the plaintiff, after cutting down the corn, collected it into cocks for the greater convenience of carriage, which was more than he was obliged to do of common right; and this, it was said, was a sufficient consideration for setting out the eleventh cock instead of the tenth; and several cases were cited on both sides.

Eyre C. J.—The parishioner does no more than he is obliged to do, and therefore there is no foundation for the custom. In the case of *hay*, he is only obliged to set it out in cocks, and is not obliged to make it into hay. If the custom fails in one part, it is void in the whole. To which the rest of the court agreed, and the rule was made absolute for arresting judgement."

Besides, as to some parts of the barley and oats, they are set out by measuring the length and breadth of the sward without the depth; which is uncertain, and not like the case in *Hob. 250.* that in divers places they set out the tenth acre of wood standing, and so of grafs; for there, for aught appeared, the medium might be equal.

As to the inconveniencies objected by the defendants, it is to be observed, from the depositions of *William Stead*, *Mr. Gascoigne*, *Mr. Keeling*, and others, that the method of gathering short corn into heaps is well known to husbandmen in general, most convenient for loading, and keeping it from damage by horses and waggons, and from rain, and that such corn is better prepared for the stack when heaped, than when reared, and less liable to mow-burning.

But it is objected by my brother *Adams*, that these depositions relate to the course of husbandry and not to the tithing of soft corn. But, in my apprehension, it is clear, that where barley and oats are harvested by cocking, they must, consequently, be tithed by the cock, and not in the sward.

It is further objected, that setting out in the sward is a sort of cocking. To this I answer, that barley and oats ought to be
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cocked before tithing ; and cocking before loading is not sufficient. It is tithing by the fork, and bad tithing.

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As to the demand of tithe of wood, it is insisted that it was burnt in the house, and no tithe was ever paid for what was burnt in the house. And in proof of that was cited *Goodall v. Perkins*, H. 6 W. 3. (and *supra* 543.) that wood burnt in a house in the parish is exempt from tithe. So *Taylor v. Hall*, M. 8 W. 3. that the parishioner is not to be charged with tithe of wood burnt in the house. *Abbot v. Hicks* in the same term, (and *supra* 838.) S. P. So, *Baughton v. Wright*, (*supra* 658.), that wood burnt in the house or used for fencing is free from tithe without a custom. But this exemption for wood cut to burn in the house is not of common right, but only by special custom. So it was holden, in the case of *Norton v. Farmer*, Cro. Car. 113. (*supra* 829 n.) and it operates by way of customary exemption in respect of some satisfaction to the person, which it lies on the parishioner to shew. And that a custom must be alleged appears also from *Dowdeswell v. Harker*, Tr. 12 W. 3. in this court, from *Dodd's MSS.* (1) *Thomas v. Duke of Beaufort*, Scac. 12 Nov. 1726. *Wolferstan v. Bragington*, Tr. 20 Geo. 2. 1746. *Hatfield v. Sir Benjamin Rawlings*, after Hil. 1750. and *Walton v. Tryn*, (*supra* 827.) of which case Lord *Hardwicke* favoured me with his own notes, with liberty to have them copied.

As to the tithe of milk, it appears by *Wilkins's Anglo-Saxon Laws*, fo. 191. that it is due the tenth day ; " *Qui caseam fecerit, det Deo decimum : Si vero non fecerit, lac decimo die.*" So *Dodson v. Oliver*, Bunb. 73. (*supra* 623.) the tenth meal of milk is due of common right. The like point in *Carthew v. Edwards* in this court, Tr. 1749. (*supra* 826.) This certainly is the most equal rule of tithing milk, though at some times the parson will have the advantage, and at other times, the parishioner. In the case of *Bedle, rector*

(1) That case was as follows : " The plaintiff brought his bill (among other things) as rector of *Kingham* in *Oxon.* for the tithe of furze and wood. Upon the defendant's answer and hearing the cause, it appeared to be burnt in the house ; and the defendant having said generally that no tithe of furze or wood burnt in the house was payable by the custom of the parish, the court resolved accordingly, and said, that, generally speaking, tithe of wood burnt shall be paid ; but, if there be a custom in the parish to the contrary, viz. in non decimando, it is good ; and so the books shall be intended." *Vid. Moore* 909. Cro. Car. 113. 1 Sid. 447. 1 Ro. Abr. 644. and they dismissed the bill quoad that demand. *Dodd's MSS. penes Hargrave.*

1769. *of Great Burstead in Essex, against Miller and others, 5th February* 1690, it was holden, that of common right and without a custom, the vicar ought to fetch the tithe-milk. It would therefore be very inconvenient if it was to be sent for twice a-day; for each time there might not be a pint.

Perrott B. was of opinion that the bill ought to be dismissed, but not with costs, as to the not setting out the tithe of the whole field at once; and that the proper mode of setting out barley was in cocks.

The bill against *Ruffle* was dismissed as to tithe of wheat in *Wiggon's Leys*, *Rewle Croft*, and *Twillage*, and of calves, hay, wool, lamb, pigs, eggs, poultry, apples, milk, wood, and pigeons, without costs: but he was decreed to account for wheat in *Lambor Field*, *Sandpit Field*, and *Holder's Mead*; and for barley, oats, and peas, in all his lands not accepted by the plaintiff, without costs.

The bill against *Brewster* was dismissed as to milk, wool, lamb, pigs, poultry, apples, pears, and garden-stuff, without costs: but he was ordered to account for wood, and oats in *Honey-croft*, not accepted by the plaintiff, and for agistment, without costs.

With respect to costs, *Smythe B.* differed from the other Barons, being of opinion, that each of the parties should pay costs, as to the matters decreed against them respectively.

M. 10 Geo. III. A. D. 1769. Scac.

Wood v. Harrison. [3 Wood's Decr. 250.]

A custom to pay 4 s. for every ten lambs fattened, 2 s. for every five lambs fattened, 4 d. a-piece for all under five; and for all above such five and under ten, 4 d. a-piece on the shearing-day; and 3 d. a-piece for all other lambs bred in the parish, in lieu of the tithes of such lambs, is void.

THE bill stated, that about the 12th of February 1763, the plaintiff was presented, instituted, and inducted, into the rectory, parsonage, and parish church of *Hemsworth*, with its rights and appurtenances, in the county of *York*, and had ever since been and then was the lawful rector and incumbent thereof, and as such entitled to all tithes, great and small, and other ecclesiastical dues arising therein and in the tithable places thereof; that the defendants, during the year 1763, occupied divers lands and tenements in the parish, and had grown thereon clover; that the said clover had been, during that year, twice mowed, severed, and made into hay; that they also had agisted and depastured barren and unprofitable cattle; that they had also had large quantities of turnips; that the tithes of the said several matters had become due to the plaintiff, and ought to have been paid him in kind, or some satisf-

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satisfaction made to him for the same; but that they had refused either to set out or pay any tithes, except the tithe of the first crop of clover, or to give him any account of the nature, quantities, or values of such tithable matters and things. The bill also charged, that clover had not been sown and grown immemorially in the parish; and prayed that the defendants might account for and pay the said tithes.

The defendants admitted, that the plaintiff was rector, and entitled to the great and small tithes, and other ecclesiastical dues of the parish; but they insisted, that no tithes of any second crop of clover in the same year in the same parish had ever been rendered or paid after the tithes of the first crop thereof had in the same year been made into hay, and paid to the rector or his farmer, or satisfaction made to him in lieu of the tithes of such second crop; that no tithes of such second crop had ever been claimed or demanded until lately by the plaintiff; that the occupiers of lands within the said parish, making at their own expence the tithes of the first crop of clover into hay in great cocks for the rector, had for time immemorial been accepted, deemed, and taken as and for a satisfaction of tithes of the second crop, and had been accepted as such by the former rectors of the parish. They further insisted, that the tithes of lambs were not due or payable in the said parish in kind, for that, by an immemorial custom therein used and approved, the owners of lambs, from time to time lambled or fallen in the parish, or the limits thereof, had, from time to time, immemorially paid and used, and of right ought to pay to the rector of the parish, or his farmer or tithe-gatherer there for the time being, a modus or customary payment in money of 4s. and no more, for every ten lambs depastured or fattened; 2s. and no more for every five such lambs; 4d. a piece for all such under five; and for all such above five, and under ten, 4d. a-piece, and no more, yearly, at the time when the rector's tithe-gatherer or farmer thereof collected the tithe-wool, in lieu of the tithes of such lambs; and for all other lambs bred within the said parish 3d. and no more, yearly, payable as aforesaid, for and in lieu and in satisfaction of the tithes of and for all such other lambs; that such moduses had, from time to time, during all the time aforesaid, been accepted and taken in lieu and satisfaction of such tithes by the rector of the parish, or his farmer or tithe-gatherer, till lately that the same had been objected to by the plaintiff, and refused to be accepted of. They further insisted, that by the immemorial custom of the said parish,

A custom to make the first crop of clover into hay, in lieu of the tithes of the second crop, is good.

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the owners of sheep from time to time fed and wintered therein, and sold before they were clipped, had immemorially paid to the rector, his farmer or tithe-gatherer, a modus of one penny, and no more, for every such sheep yearly at *Lady Day*, in lieu of the tithes of and for the depasturing and agistment of all such sheep; that such modus had been, from time to time during all the said time, accepted and taken for and in lieu and satisfaction of such tithes by the rector, his farmer or tithe-gatherer, till lately that the plaintiff objected thereto and refused to accept the same. They denied that they had subtracted any tithes whatever which were due to the plaintiff, save only as aforesaid, and the said moduses which the plaintiff had refused to accept; and they averred that they all along had been and were respectively ready to account with and pay him the same, and that they never had refused so to do.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon hearing counsel on the 28th day of *June* last on both sides; and reading the answer and several depositions taken in the cause, the further hearing of the cause was adjourned to this present term, to be further heard and argued upon as to the questions of clover and the modus for lambs. The cause came on to be further heard this day; and upon full debate of the matter, the court declared, that the moduses alleged in the pleadings for lambs fatted or depastured are too rank; and therefore ordered the defendant *Wilson* to account with the plaintiff for the tithes in kind of all the lambs and sheep by him fatted and depastured in the parish in the year 1763, and satisfy the plaintiff the same.

The court further ordered the defendant *Harrison* likewise to account for the tithes of agistment of all barren and unprofitable cattle by him fed and depastured within the parish during the said time, and to satisfy the plaintiff the same.

Ambler. 563. As to the modus for clover, it was argued by *Huffey* and *Maddocks* on the part of the plaintiff, that it was bad, being laid for clover; because clover had not been sown in *England* in any quantity so long as was necessary to support a modus for it.

On the other hand it was contended by *Ambler* and *Robinson*, that it was merely an impropriety of expression in laying the modus for clover: that if it had been laid for grass made into hay, it had been well enough; for though clover might not be sown in any quantity at the time when the modus is presumed to commence, yet, being a species of grass, it would be covered by a modus for grass

grafs generally: that the court looks to the substance of the defence, and the true merits of the question, without regarding the words of it, and in case there is contradictory evidence, will direct an issue: that *Chapman v. Smith* (*supra* 847.) before Lord Hardwicke, was a much stronger case; because the thing there excepted out of the modus was not a species of the genus which was covered by the modus; and yet an issue was directed.

The Barons, having taken time to consider, were of opinion, that the modus as laid was not bad; for though clover was of modern date in respect of long antiquity; yet, as it was a species of grafs, it would have been covered by a general modus for grafs made into hay. It was to be considered only as a mistake in the expression, and the modus ought to be tried; and the rather, as the defendant must prove a modus for grafs, in order to support his case. An issue was directed, not in the words of the answer, but generally for grafs made into hay: which was done at the instance of Mr. Baron Perrott, who expressed his apprehensions, that if it was laid for clover, it might prejudice the jury upon the trial.

But it should seem from the Decree-book, that Mr. Ambler is mistaken as to the terms in which the issue is conceived, for it appears there to have followed the words of the answer, and to have been laid for the clover. It was, "whether it was the custom of the parish of *Hamsforth* in the pleadings mentioned, for time immemorial used, for the tenants and occupiers of lands lying within the same parish, at their own expence to cut and make the first crop of clover grown thereon into hay and great cocks, and to render and pay to the rector of the said parish for the time being, his tenant or farmer, the tenth part or tithe of the second crop of clover grown upon the same lands, and cut and made into hay in the same year." This issue came on afterwards to be tried, but a juror was withdrawn, the plaintiff undertaking not to make any demand of the tithe of the second crop of clover during his incumbency, without prejudice nevertheless to the question, whether such tithe was due.

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P. 10 Geo. III. A. D. 1770. Scac.

Wilson D. D. v. Masen. [3 Wood's Decr. 28.]

An ancient water-corn-mill doth not lose the privilege of being tithe-free by being occasionally used as a lead-mill. Corn ground for the purposes of distillation by a person not resident in the parish where the mill is worked, though the mill be lately erected is not taxable.

THE bill stated, that the plaintiff, about the 30th of *August* 1763, was instituted and inducted vicar of *Deptford*, otherwise *Saint Nicholas Deptford*, in the county of *Kent*, and had thereby become entitled to all vicarial tithes arising therein, particularly to the tithe of the clear profits arising from any mills; that the defendants being distillers had, during the time the plaintiff had been vicar of the parish, occupied two mills, one of which was a water-mill, and the other a wind-mill; that the water-mill was a very ancient one, and had been formerly used as a lead-mill, but had since been converted into a corn-mill to grind corn; that the wind-mill had been erected about thirty-two years; that at both the said mills the defendants ground corn into meal for the purpose of distillation; that they also ground therein barley, rye, peas, and other grain, to feed hogs for sale; that the said hogs were fed out of the said parish; and that the plaintiff had no profit therefrom, but of which the defendants made considerable profit; that he had frequently applied to them for payment of the tithes of the said mills or some reasonable satisfaction for the same; but that they had refused so to do, under pretence that the water-mill was an ancient mill, and therefore exempt from the payment of tithes; and that no tithe had ever been paid for the same, except from the year 1704 to 1727; that the vicar for the time being had, during the said interval, made an entry in his book of 1 l. 10 s. *per annum*, for the tithe of the said mill; and that, during that period, it had been worked as a lead-mill: but the plaintiff contended, that as the account of the payment of tithe for the said mill from 1704 to 1727 was, from the very beginning of the book to the day of the then vicar's death, and as the other books prior to such book were lost, it was no evidence that no tithes for the said water-mill had been paid before the year 1704. He further said, that the construction of the said water-mill had been greatly altered within twenty years then last past; and that notwithstanding the said water-mill might have been formerly an ancient corn-mill, yet, as the same was afterwards converted into a lead-mill, such conversion absolutely destroyed any prescriptive right the defendants might pretend

tend to claim of the said mill being discharged from the payment of tithes : and he expressly charged, that as the defendants had made great profits of the said mills in their way of trade, he was justly entitled to a tenth of the clear profits arising therefrom. The bill therefore prayed, that the defendants might come to a fair account with him for the arrears of tithes then due and owing for the said mills ; and that they might pay such arrears, or some reasonable composition or satisfaction for the same, and pay the said tithes for the future as the same should become due, so long as he should continue vicar of the parish.

The defendant *Mason* admitted, that the plaintiff was vicar, and entitled to all vicarial tithes arising in the parish ; but, whether to the tithe of the clear profits arising from any mills therein, he knew not ; but he said, that there were some mills in the parish to the tithes of which he was not entitled. He also admitted, that the defendant *Bryant* was his partner, and that they had, during the time the plaintiff had been vicar, occupied two mills therein, one a water-mill and the other a wind-mill : and he said, that the water-mill was a very ancient one, and had been used as a corn-mill from time immemorial before the same or any part thereof was converted into a lead-mill in the year 1690, at which time only part thereof was used as a lead-mill, and that the other part, thence down to the present time, continued to be used as a corn-mill only ; and that he had great reason to believe, that the part of the water-mill which was so used as a lead-mill was only continued to be so used down to the year 1735 ; but believed, that it did not appear by the books of account of any of the vicars of the parish, either precedent to 1704 or subsequent to 1727, that any tithe or composition for tithes had been paid for the said water-mill as a lead-mill, nor that any tithes or composition for tithes whatsoever had been at any time paid, either for the said water-mill as a corn mill or the said wind-mill, or that any thing was due to the plaintiff for tithes on account of the said mills. He admitted, that the wind-mill was erected by his father, and that they had ground corn at both the said mills into meal for the purpose of distillation from the time the plaintiff had been vicar ; and that they continued so to do. They denied, that they ground barley, rye, peas, and other grain at both the said mills to seed hogs with for sale ; but said, that they ground such sorts of grain at the water-mill only ; that the hogs were fed in the parish of *Greenwich* ; that they never used their mills than as aforesaid ; that they made no other profits
or

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or gains thereby; and that they believed the plaintiff was not entitled to the tithes thereof; but they submitted to the judgement of the court. They admitted, that the plaintiff had applied to them for payment of tithes of the said two mills, but said, that he did not demand any particular sum of money for such tithes, or specify for what particular thing he had made such demand; and that they refused, for the reasons aforesaid, to pay him any thing on account of such tithes: and he submitted to the court, that in regard by the plaintiff's own shewing, it did not appear by the books of account of the profits of the vicarage, then in his custody, that any tithe had been paid for the water-mill before the year 1704, and as he did not produce the other books prior, under a pretence that the same were lost, it was an evidence that no tithes whatsoever for the said water-mill were paid before 1704, and also by reason of non-payment of tithes of the said mill ever since 1727, that it ought to be presumed, that the vicars of the parish, ever since 1727, had been so sensible that no tithes for the mill were due, that they had forborn to demand the same. He denied, that the construction of the water-mill had been at all altered within twenty years; but admitted, that several granaries and other buildings had been erected; and submitted to the court, whether the mill ought to pay tithes to the vicar: and he set forth the particular species and quantity of grain which had been ground there; and submitted, whether they ought to discover the number of hogs fed, and the profits which arose therefrom, or of their distillation; and therefore did demur and object to such questions.

The defendant *Bryant*, by his guardian, put in the like answer.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and the proofs taken in the cause were read; and a book, containing entries by *Dean Stanhope*, viz. of money received for *Hall's Lead Mill*; likewise of *William Fox* for *Gummon's Lead Mill*, was also read; and it was admitted, on the behalf of the plaintiff, that at the time for which the claim of tithe was made, and at the filing of the bill, the defendant lived in the parish of *Greenwich*, and not where the mills were situated.

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Mr. Comyns argued for the plaintiff. He said, that the plaintiff is entitled to the tithe of both mills; which tithe by the canon law is to be paid by the tenth dist, as a predial tithe. At common law indeed there have been great differences as to these points. It was determined in *Newte* and *Chamberlain* that it is a personal tithe, and that the tenth part, after deducting all expences, is to be paid. But

that was the case of a new mill. In *Bunb.* 73. *Dodson and Oliver*, and *Bunb.* 183. it seemed then a doubt. 2 *P. Wms.* 463. *Carleton and Brightwell*. In *Thomas v. Price*, in the Exchequer July 1759, the defendant was decreed to account as for a personal tithe.

Mr. *Huffey* for the defendant.—No; tithe was ever paid for corn manufactured in the course of trade. The grist-mill is an ancient mill. The alteration is no extinguishment or suspension of the exemption. If the thing for which a modus is paid is destroyed, the modus is gone. When a mill is removed from one stream to another, the mill is destroyed. If there is a modus for a wood, and the wood is destroyed, the modus is gone. So of a modus for a park, when disparked; unless the modus goes with the land, and not with the park. But in *Curth.* 215. the modus is not destroyed by the addition of two new pair of stones. In the present case, there was no alteration in the mill; but part of it was put to another use. The alteration was for the benefit of the parson, as it ground less corn. He might stop working one wheel, and that would not destroy the exemption. But this being a personal tithe no tithe is due. Or, if it is due, yet the mills not being used for grinding in the common course of a miller, are not liable to the payment of it.

As to the first, the statute of *E. 6.* says, that no tithe shall be paid, where they are not used to be paid.

[Lord C. B.—The words are, “where they have been paid, or of right ought to have been paid.”]

Before *Newte* and *Chamberlain* there is no decree that ever directed the tithe of mills as a personal tithe. Since that case it has never been determined, that an occupier living out of the parish is to pay to the parson of the parish, where the mill stands. The defendant lives in *Greenwich*: it is so stated in the plaintiff’s bill. The mill-house is not occupied.

As to the second, if the corn be ground for the purpose of trade only, and not used by the person grinding as corn, but employed to some purpose of his trade, it is not tithable. In the statute of *Articuli Cleri*, the word *molendinum* is very general: and yet it was holden to extend only to a grist-mill. Lord *Coke* says, where it is a mill for an art or mystery, no tithe is due. 2 *Cro.* 523. All the cases apply only to the case of millers. No mill used in a course of other trade pays tithe. Why should a distiller pay? The corn goes through several processes in the course of a distillery.

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The demand of tithe by the ecclesiastical law is, *decimæ proven-
tuum, decimæ multuræ*. But it is said, that this mill is liable, be-
cause it is a corn-mill. The use of the corn ground makes the
difference: it is not for food.

2dly, No tithe is due, when the corn is not ground for hire.
There is no case where it has been paid; nor any hint in the books
that it is due from a private mill for private use. The demand of
a tenth toll dish supposes grinding for hire, not for one's own home
consumption or manufacture. The demand here is for bruising
the corn for the hogs food or for distilling: the mill is so employed
to save the labour of a number of men. A brewer grinding his
malt ought not to be liable. 2 *Bulstr. Dolly and Davis*. The
statute of E. 6. does not allow the examination of the party on
oath as to personal tithes: this court having a concurrent jurif-
diction ought not to exceed the rule of the ecclesiastical courts.
There can be no distinction between the tithe of mills and any
other personal tithes. If the party can be examined upon oath for
these tithes, he may for other personal tithes, and every man will
be obliged to give an account of his profits in trade to any person
who may please to call upon him for it.

Sayer S. J.—The mills are engines for the fattening of hogs,
and the purposes of distillation. They are mere engines of trade:
the tithe cannot be ascertained. In *Newte and Chamberlain* the
corn had been sold. In *Bunb.* 174. it is said by *Baron Gilbert*, that
Easter offerings are a compensation for personal tithes.

Comyns in reply.—Lord *Coke* says, that tithe is due for *all* mills,
whether new or old. The clause of the statute of E. 6. respecting
personal tithes, does not extend to the tithe of mills.

[Lord C. B. said, there are several cases, where it has been
determined, that a man may prescribe in *non-decimando* for an
ancient mill.]

The tithe is due, when the corn is ground.

[*Smythe B.* said, that that cannot be; as a personal tithe, it
must be paid at *Easter*.]

The defendant is a miller in regard to grinding the corn; and a
distiller as to the consumption. He cannot by acting in a double
capacity privilege the corn ground. If tithe was once due, the sub-
sequent use can make no alteration. *Walton and Lady Mary Tryon*
was so determined. The quantum may be uncertain until the ac-
count is liquidated. Cases of other mills are not applicable.

By

By turning a corn mill into a lead-mill the evidence of payment is lost.

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Lord C. B.—The making use of one of the wheels as a lead-mill is only a suspension, *Luttreli's case*, 4 *Rep.* but how far being a personal tithe, and the corn after it is ground being used for the purpose of distillation, shall make an alteration, is very important. It is likewise a great doubt to whom it is to be paid.

Smythe B.—The questions are, as to the use of the corn, and to whom it is to be paid.

Parratt B.—The question is, whether where the mill grinds in a course of manufacture, and no meal is sold, any tithe is due? The rule as to personal tithes is, that a profit must be made of it; and the question is, whether the profit must not be made of it in its quality of corn? The House of Lords has not determined, that they are personal tithes, but only that they shall be payable in the nature of personal tithes. Several bills have been brought for personal tithes, as for tithes of fish, and yet the defendants have answered. At the time of *E. 6.* the tithe of mills was considered by the canon law as a predial tithe. The prohibition to the Ordinary not to examine the party upon oath could not be supposed to extend to this species of tithe.

Afterwards, on *Monday, 28 May 1770*, the judgement of the court was delivered by

Parker C. B.—This is a bill brought by the plaintiff, as vicar of *Deptford* in *Kent*, for an account of the tithes of two mills, the one an ancient water-mill, and the other a wind-mill erected about 30 years ago. The case upon the pleadings and proofs is, that the defendant *Mr. Mason* and his late partner, *Mr. Briant*, were distillers, and ground corn into a coarse meal or flower for distillation, and fed hogs with the wash or grains for sale, and occasionally gave some of the corn ground to the hogs to keep them forward; but no profit was made of the mills in any other way. The deed of the 28th of *July, 17 Eliz. 1575*, describes the water-mill, as called, *The Old Flood Mill in the parish of Deptford*; and the witnesses on both sides speak of it as an ancient mill. *John Sherwin*, one of the plaintiff's witnesses, says, that the southern wheel of the mill called, *The Tide Mill*, was used as a lead-mill 45 years ago; and he and the other witnesses agree, that it was so used for some years, until it was afterwards used by *Mr. Briant*, and then by him and *Mr. Mason*, wholly as a corn-mill. It does not appear, that any tithes have been paid for the ancient mill, except by two entries

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of Dr. *Stanhope*, a predecessor of the plaintiff in this vicarage, which are, "In 1702, monies received on account of my vicarage of *Deptford*, for the tithes of Mr. *Hale's* lead-mill, 1 l. 10 s. 1703, "Monies received on account of my vicarage of *William Fox* for *Gamon's* mill, 1 l. 10 s." And a terrier was delivered in in 1713 at the archdeacon's visitation mentioning these payments. It is sworn by the answer, that all the corn with which the hogs were fed, was ground by the water-mill. And though 63 quarters of wheat-meal were sold upon the proclamation for stopping distillation, yet they were sold for less than the wheat cost.

It was admitted at the hearing, that the defendant and his late partner lived in *Greenwich*, and never in the parish of *Deptford*.

In *Ansell v. Adman*, Tr. 7 W. 3. 1695, in this court, it was resolved that of an ancient mill tithes should not be paid, for the statute of *Articuli super chartas* implies that, and the bill was dismissed. *Dodd's MSS.* But, as to the ancient mill, it was objected by the plaintiff's counsel, that by altering the nature and quality of the mill, by turning it from a corn-mill into a lead-mill, the privilege of exemption from tithes was destroyed, and could not revive by re-converting it into a corn-mill. They cited 1 *Brownl.* 32. "If two fulling-mills be under one roof, and a rate tithe paid for the mills, and after you alter these mills, and make one a corn-mill; your rate is gone, and you must pay tithe in kind: or, if you have but one pair of stones in your mill, and pay a rate for them; then, if you put on another pair of stones, your tithes must be paid in kind." This is only a note. In *Gumble v. Falkingham*, Carth. 215. the latter part of the case in *Brownlew* was denied; for it was there holden, that a modus is not destroyed by the addition of a new pair of stones. And we are of opinion, that the mill is the substance and thing exempted, and using one of the wheels as a lead-mill for a time will not destroy the exemption. *Luttrell's* case in 4 *Rep.* 86. is a full authority to this purpose. But, if the ancient mill now in question had been wholly used as a lead-mill, it, at most, could have only amounted to a suspension, till it was re-converted into a corn-mill, but not to an extinguishment. In *Brown's* case, *Goulb.* 194. it was holden by the whole court, that if a man hath a modus for hay in *Black Acre*, and he soweth the acre seven years together with corn; this doth not destroy the modus, but it shall continue, when it is again made into hay. So is *Cowper* and *Andrews*, 1 *Ro. Rep.* 121. and Lord *Hobart* in his report of that case (*supra* 275.) is express, that though for the time
these

there were no deer in the park, there could be no venison according to the modus; yet the park might be reflored and replenished at any time, and therefore there could be no extinguishment of the modus. Still less then could the two instances of payment of 30s. a year to Dr. *Stanhope* destroy the exemption in the present case.

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Therefore, as the exemption of the ancient mill is not destroyed, the only remaining question is, whether the plaintiff is entitled to any tithe for the corn ground at the wind-mill? And this will depend upon the several points, which have been made by the counsel on both sides, for the consideration of the court.

I think, that the defendant *Mason* and his late partner may be considered as millers as well as distillers; like the case of *Hobbs and Young*, 2 *Show.* 267. and *Carth.* 162. where a *Turkey* merchant was holden to exercise the trade of a clothier, who employed cloth-workers to make cloth, and dyers to dye it, because he had the whole profits of the trade, and the cloth-workers and dyers only acted as his servants. And therefore if any clear profits had been made of the meal or flower ground at this mill, exclusive of the trade, I should have thought that tithes would have been due for them, from the defendant and his late partner.

But, it was objected by the defendant's counsel, that this being a demand for personal tithes, they are payable to the incumbent of *Greenwich* where the parties lived and heard divine service, and received the sacrament, and not to the vicar of *Deptford*; for by the stat. 2 & 3 *E. 6. c. 13. § 9.* it is enacted, that on refusal to pay personal tithes it shall be lawful for the ordinary of the diocese where the party is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the party's own corporal oath, concerning the true payment of the said personal tithes.

There had been great difference of opinion from time to time among the judges, whether the tithe of a mill was a predial or a personal tithe; some holding it to be a predial, and others a personal tithe. And in the case of *Newte v. Chamberlain*, (which was the case of a newly-erected mill), the then Barons of this court held it to be a predial tithe: but, upon an appeal to the House of Lords, their Lordships, on the 17th of *February 1706*, reversed the decree, and ordered, that the plaintiff should recover his tithes of the mill in the nature of a personal tithe only, (*viz.*) the tenth part of the clear profits of the corn ground in the mill over and above all

Supra 596.

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incident charges. And as the Lords determined the tithes of a mill to be in the nature of personal tithes ; and as, according to *Lindwood* 195. the right to personal tithes is founded on the benefit the parishioner has from hearing divine service, and receiving the sacrament ; such tithes (supposing any to be due in this case) would not be payable to the plaintiff, because the defendant and his late partner never dwelt in the plaintiff's parish, but always in *Greenwich*, and had those spiritual benefits there.

It was then argued for the defendants, that Mr. *Mason* and his late partner being concerned in a distillery, ground corn only for the use of their distillery, but not to sell it when ground, or until the best part of it was distilled into some spirituous liquors, and the wash or grains given to hogs for sale ; but that no profit was made of it in its state of meal or flower, and that therefore no tithe was due for the corn so ground.

Now the profits arising from the distillation and feeding of hogs are so intermixt with the grist or multure of the corn, that we do not see by what medium they can be separated, or how we can distinguish the quantum of the plaintiff's satisfaction for the grist or multure from the profits of the trade, which he ought to have no share of upon his present demand of tithe of a mill. And the case of *Dolley v. Davies*, 2 *Bulstr.* 141. in my apprehension, shews, that the plaintiff is not entitled to tithe for the profits of the trade of the defendant *Mason* and his late partner. That was a libel in the spiritual court against an inn-keeper at *Bristol* for the tenth of the profits of his kitchen, stable, and wine-cellar, and a prohibition was granted. Nor is this like the case of *Newte v. Chamberlain*, where the tithe might be adjusted by the toll which had been taken, deducting the charges ; for in this case there is no toll ; and when there is no toll or other profit exclusive of trade, there can be no tithe. Besides, all the corn with which the hogs were fed, in the present case, was ground at the ancient mill, and so exempt from tithe.

But in answer to this it was said by the plaintiff's counsel, that the tithe of a mill becomes due by grinding, or converting the corn into meal or flower, and cannot be altered by any subsequent application : for as, according to the case of *Walton and Tryon*, 16th December 1751, (*supra* 827.) Lord *Hardwicke* held, that the converting of a timber-tree into cord-wood would not give it a tithable quality ; so, on the contrary, no subsequent application of the corn after the grinding will exempt it from tithe. But this

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objection is founded on a mistaken supposition, that the tithe becomes due by grinding the corn; which is not so: for it was rightly observed by the defendant's counsel, that this being to be accounted for in the nature of a personal tithe, and all incident charges to be deducted, it is by the seventh section of 2 & 3 E. 6. to be accounted for annually at *Easter*; and as the tithe may be more or less according to the deductions, it cannot properly be said to be due until the end of the year, when the balance may be adjusted with certainty, after making these deductions.

It was then insisted by the defendant's counsel, that no tithe of a mill has been paid by distillers, starch-makers, or other traders, for the profit made of corn after manufacturing it in their several trades: and I agree to what Mr. Justice *Doddridge* says in 2 Ro. Rep. 84. that the usage of the country ought to be respected in these cases.

It was then objected by the defendant's counsel, that no mills are to pay tithe, but those which grind for sale, and not those that grind for home consumption. I lay no stress upon this objection, because the corn ground at this mill was either ground for distilling it into spirituous liquors, or for fattening hogs, for sale, and not for home consumption.

Upon the whole, we are all of opinion, that the bill ought to be dismissed: but, as this is a new case, and the plaintiff had a probable cause of suit, we do not think fit to give costs. Therefore, let the bill be dismissed, but without costs.

Tr. 10 Geo. III. A. D. 1770. Scac.

Walter v. Flint. [MS.]

IN this case the compositions, which the defendants had entered into with the plaintiffs for their tithes, ended at *Michaelmas*. In the *January* following the plaintiff gave notice that he would not abide by the composition for the ensuing year; but would have his tithes in kind, or the value thereof, from the *Michaelmas* preceding. That being refused, he brought his bill for tithes. The court declared, that the notice given by the plaintiff in *January* for taking his tithes in kind, did not avoid the yearly composition subsisting at the *Michaelmas* preceding; and decreed the defendants to account for the current year according to the said composition.

Notice given in the month of January is not sufficient to determine turning a composition from *Michaelmas* to *Michaelmas*, so as to entitle the parson to tithes in kind for the current year.

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M. 11 Geo. III. A. D. 1770. Scac.

Yateman v. Cox; et à contra. [3 Wood's Decr. 302.]

THE bill stated, that the rectory of the parish of *Baldon* in the county of *Oxford*, previously to the dissolution of the monastery of *Dorchester*, belonged to and was part of the possessions of the said monastery as a rectory impropriate; that the said rectory comprehended the townships of *Baldon*, otherwise *Foot Baldon*, *Saint Lawrence Baldon*, *Marsh Baldon*, and *Little Baldon*; that a chapel was erected before the dissolution of the monastery in the township of *Marsh Baldon* as a chapel of ease only to *Baldon*; that it was served by a curate; that it was presented to for many years as a chapel; and that it afterwards took the name of a church; that upon the dissolution of the monastery of *Dorchester*, the said impropriate rectory of *Baldon*, including *Marsh Baldon*, became vested in the crown; that H. 8. granted the said rectory of *Baldon* to *Disnysius Toppes* for his life; that afterwards queen *Elizabeth* granted the reversion thereof to *Hall* and his heirs; that *Hall* conveyed the same to *Anthony Pollard* (the ancestor of the defendant *Elizabeth Lane*) and *Philippa* his wife; that in the reign of J^a. 1. the said chapel or township of *Marsh Baldon* acquired the reputation of a parish and rectory, and belonged to *Lewis Pollard*, grandfather of the said *A. Pollard*, as parcel of the original rectory of *Baldon*; that the said *Lewis Pollard*, in the reign of C. 1. sold and conveyed the rectory of *Baldon*, and also the rectory or reputed rectory of *Marsh Baldon*, to *James Jennens*, excepting the tithes of *Little Baldon*; that the plaintiff, by several mesne conveyances for several years, had been seised in fee, and was then owner of the impropriate rectory of *Baldon*, comprehending *Baldon*, otherwise *Foot Baldon*, &c. as aforesaid; that as owner thereof, he was entitled to all manner of tithes, both great and small, yearly arising in the said townships of *Marsh Baldon*, *Foot Baldon*, and *Saint Lawrence Baldon*; that for some years past, the defendant *Cox* had occupied a piece of land, called *Smith's Piece*, within the said impropriate rectory; that he had reaped and gathered therefrom, in the year 1766, a quantity of hay, the tithes whereof were due, and ought to have been paid to the plaintiff; that in the said year he had also occupied a tenement and land in *Foot Baldon*, or *Saint Lawrence*

Lawrence Baldon, and another tenement and land in *Marsh Baldon*, all lying dispersed in the common-fields of *Baldon*, and within the said rectory of *Baldon*; that he had cut therefrom a quantity of clover, and carried the same away, without setting out the tithes thereof; that the greater part of the lands belonging to the townships of *Marsh Baldon*, *Saint Lawrence Baldon*, and *Foot Baldon*, lay intermixed in the same common-fields; that each of the tenants and occupiers of lands in the said townships had, in respect of the said lands, common for a certain number of sheep and cows in the said common-fields; that the said defendant had fed and depastured in the said year, on the said common-fields, in right of his farm in *Foot Baldon*, or *Saint Lawrence Baldon*, several cows and sheep; that he had had therefrom milk, lambs, and wool, the tithes of which ought to have been set out and paid to the plaintiff; that in the said township of *Marsh Baldon*, within the said impropriate rectory of *Baldon*, there were several pieces of meadow or pasture land, called *Battin's Close*, *Cheney's Close*, otherwise *Hayes*, otherwise *Burnt-house Close*, occupied in 1759 by several people; that the tithes of corn, grain, and hay, yearly arising in and upon the said closes, had been, time out of mind, set out and paid to the persons from time to time entitled to the said rectory impropriate of *Baldon*; that the tenants of the said closes severally made hay, and had duly set out the tithes thereof for the plaintiff's use; but that the defendant *Car* had entered on the said closes, and taken away the tithes, and converted the same to his own use, without making the plaintiff any satisfaction for the same; that there was in the said rectory of *Baldon*, a piece of land, called *Knowle*, thencefore parcel of the said common-fields, but for many years then past enjoyed in severalty, and planted with furze; that five lays or half acres thereof were, in the year 1766, in the occupation of the defendants *Lane* and *Bacon*; that they in the said year gathered therefrom furze, and conveyed away the same without setting out the tithes, though the former occupiers had constantly paid tithes to the plaintiff; that the defendant *Lane* had also from the 1st of *January* 1766 occupied several pieces of land lying within the said rectory, called *Hatchet Close*, *Forty Acres Piece*, and *Hatchet Piece*; that he had since that time reaped and gathered therefrom a quantity of hay, but had not set out the tithes thereof; that the defendant *J. Martin* occupied a piece of land, called *Hanging Lands*, for several years, as tenant to the defendant *P. Bacon*; that he had made thereon hay; that he had also fed and depastured cows, sheep,

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colts, and other tithable cattle, which had produced milk and calves, wool and lambs, the tithes of all which were due to the plaintiff; that he, the plaintiff, had frequently applied to the defendants to come to an account for the tithes so by them respectively withholden from him, and to make him a satisfaction for the same, but that they had refused so to do. The bill therefore prayed, that the defendants might be compelled, by decree, to come to a fair account with the plaintiff for all such tithes by them respectively withholden or taken as aforesaid, and to make a satisfaction for the same.

The plaintiff filed his bill of revivor and supplemental bill against *Sarah Cox*, stating, that *W. Cox* the defendant had died without making him any satisfaction for the said tithes; that he had appointed her, his sister, executrix of his will; that she had proved the same, and possessed herself of his personal estate, &c.; that she had since his death taken up the tithes of hay in *Battin's Close*, and converted the same to her own use; and that she had refused to make him any satisfaction for the same; and praying that she might be decreed to account for the tithes so subtracted by her brother in his life-time.

The defendants *E. Lane* and *P. Bacon* insisted, that the rectory of *Baldon*, otherwise *Foot Baldon*, and the rectory of *Marsh Baldon*, were two ancient, distinct, and adjoining parishes and rectories, and in some parts intermixed with each other; that the manors of *Foot Baldon* and *Marsh Baldon* were likewise ancient and distinct manors, and nearly co-extensive with the said parishes; that the rectory of *Foot Baldon*, and all the tithes thereof, both great and small, were, before the dissolution of the monastery of *Dorchester*, part of the possessions of the said monastery, as a rectory impropriate, and comprehended the townships of *Foot Baldon*, *Saint Lawrence Baldon*, otherwise called *Bishop's Baldon*, and *Little Baldon*; and that the rectory or parish of *Marsh Baldon* never was comprehended in the rectory of *Baldon*, otherwise *Foot Baldon*; that in the parish of *Marsh Baldon*, otherwise *Marsh Baldington*, there was an ancient parish church, which might formerly have been presented to as a chapel having the cure of souls; but that the same never was a chapel of ease to *Baldon*; that the said parish of *Marsh Baldon* had been, long before the reign of *James* the first, considered as a parish and rectory of itself, as appeared by an ancient grant in the third year of the reign of *Edward* the third, and in other deeds and ancient rolls of the courts held at *Marsh Baldon*, wherein *Richard de Alien* was called "rector of the church of *Marsh Baldington*;" that
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on the dissolution of the monastery of *Dorchester*, the rectory of *Baldon*, or *Foot Baldon*, not comprehending *Marsh Baldon*, save as to a portion of the great tithes thereof, became vested in the crown; and that *A. Pollard* and his wife became seised thereof by grant from queen *Elizabeth*; that the said rectory and appropriated portions of the rectory or great tithes of *Marsh Baldon* afterwards came to *L. Pollard*, who conveyed the same in 1626 to *J. Jennens*; and that the said rectory and the said portions (except such of the tithes thereof as were excepted or reserved by the said *L. Pollard*, or that had been since granted away) had been, by several mesne conveyances and descents, since vested in the plaintiff. And they denied, that the said church, manor, or estate of *Marsh Baldon*, had ever belonged to *L. Pollard*; or that the said plaintiff was ever entitled to all tithes, both great and small, within the parish of *Marsh Baldon*; and insisted, that the defendant *Lane* was seised in fee, in her own right, of the manor or lordship of *Mars Baldon*, then lately called *Marsh Baldon*, and to several farms and messuages thereto belonging, particularly to a farm known by the name of *The Manor Farm*; that she was also seised in fee of the advowson and right of patronage of, in, and to the rectorial and parish church of *Marsh Baldon*; that she being so seised in 1735 presented the defendant *P. Bacon* to the said rectory and parish church; that he, being instituted and inducted thereto, became entitled to receive all tithes arising within the said parish and the tithable places thereof, or to some modus, composition, or satisfaction in lieu thereof, save and except certain corn tithes, in the proportion of one in fifteen, of and in certain pieces of land parcel of the *Manor Farm*, containing about 96 acres, and also on certain other lands lying dispersed in the common-fields of *Baldon* of one in ten, and also except 20s. *per annum* which had been constantly and immemorially paid by her in lieu and satisfaction of some other tithes arising on the said lands belonging to her.

The defendant *Lane* also insisted, that there were divers ancient moduses payable by her to *Bacon*, in lieu of the tithes arising on certain lands in the said parish of *Marsh Baldon*, and particularly an ancient modus of 14l. *per annum*, which had been immemorially paid by her and her ancestors to the rectors of the said parish, in lieu of all tithes arising within the *Manor Farm*. She also insisted, that she was also seised in fee, or otherwise entitled to certain pieces of land, called *Hatchett's Close*, *Kuowle Piece*, and other lands partly

1770. partly in the said parish of *Marsh Baldon*, and partly to *Foot Baldon*, formerly part of an estate called *Baldon*.

Both the defendants denied, that the plaintiff was entitled to any tithes arising on the several pieces of land called *Smith's Piece*, *Forty Acres Piece*, *Battin's Close*, of *Three Acres*, *Cheney's*, otherwise *Hayes*, otherwise *Burnthouse Close*, and *Battin's Closes*, of *One Acre*, or in *Twenty Acres Tenement*, in the occupation of the defendant *Cox*; but they admitted, that all the tithes of the other tenements of forty acres in the defendant *Cox's* occupation belonged to the plaintiff, as lying within the said rectory impropriate of *Foot Baldon*. They also admitted, that the defendant *Cox* had, during several years, occupied *Smith's Meadow* and the *Twenty Acres*, partly in the common-fields of *Baldon*, and partly inclosed; and set forth the other lands occupied by other people.

The defendant *Bacon* admitted, that the said *W. Cox*, as his tenant, and in his right, took in the said years the tithes of the grass of the said meadows; and denied, that the other occupiers had taken away the said tithes; but said, that they were set out for him, and that the tithes of all hay arising from the said closes had been customarily, and time out of mind, set out and taken by him and his predecessors. He admitted, that the plaintiff's tenant did in 1759, but without any right, take away some hay from *Battin's Close*, under pretence of being entitled to the tithe thereof.

The defendants said, that they believed that the tenants and occupiers of lands in the common-fields belonging to *Foot Baldon* and *Marsh Baldon*, had, in respect of their said lands, right of common there for cows and sheep.

The defendant *Bacon* insisted, that all tithes arising from the cows or sheep commoned on the said fields, in right of lands in the parish of *Marsh Baldon*, belonged to him as rector thereof; but as the said common-fields had scarcely ever been full stocked, in order to avoid disputes, the small tithes arising therefrom had been usually paid for the whole to the tenants of the tithes of that parish in which the greatest part of the lands lay.

The defendants admitted, that there was a piece of heath ground lying in the said parishes, but belonging to the manor of *Marsh Baldon*, called *The Knowle*, which had been for many years planted with furze, and enjoyed in severalty, and was at certain times commonable to the owners of lands in both parishes; and they submitted, whether furze growing on commonable heaths was tithable.

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They denied that they knew, or had heard, that tithes had ever been demanded for furze growing thereon till 20 years ago, though they admitted the tenants and occupiers thereof had of late years, and did then pay tithes in kind of all furze growing thereon to the plaintiff, notwithstanding the same in other parishes adjoining was not esteemed tithable.

The defendant *Bacon* insisted, that if the plaintiff had any right to tithes of any part of the said furze, he had likewise a right to all such parts as lay within the parish of *Marsh Baldon*. He admitted, that he held five lays or half acres of land in the *Knowle*, belonging to an estate in *Foot Baldon*; that in 1761 he cut furze and fern therefrom, and carried the same away, without setting out the tithes, and used the same in burning a kiln of lime for the manure of the lands in *Forty-Three Acres Piece*, whereof the plaintiff had received a portion of great tithes, and also in burning bricks for the repairs of the farm-house; and he insisted, that it was exempt from the payment of tithes, even if furze were otherwise liable; but he denied, that the former owners thereof had constantly paid tithes for the same.

The defendants admitted, that there were in *Marsh Baldon* the lands called *Hatchett Close*, *Forty Acres Piece*, and *Hatchett Furze*; that they had been in the occupation of the defendant *Lane* since January 1761; and that she had reaped and gathered therefrom hay without setting out the tithes thereof, because she insisted, that the hay tithes of the said *Forty Acres Piece* were covered by the said modus or composition of 14l. ; and that the *Hatchett Piece* and *Hatchett Close* were part of *Little Baldon* estate, the tithes whereof were not purchased by *J. Jennens*. They further said, that they believed *L. Pollard* was in his life-time seised in fee of *Little Baldon Farm*, lying intermixed in the said parishes; and insisted, that the tithes of that part lying in *Marsh Baldon* then belonged to him and the minister or rector thereof; and that he excepted out of the sale to the said *J. Jennens* of the said impropriate rectory of *Foot Baldon* all the tithes whatsoever arising from the said *Little Baldon* estate; and that therefore none of the tithes arising from the said estate passed by the conveyance.

The defendant *Lane* admitted, that *Little Baldon* estate was, at the time of the sale and reservation, a freehold estate of inheritance; and that the said *L. Pollard* and his heirs, under such exception and reservation, afterwards enjoyed the said estate exempt from the payment of any tithes, save such as belonged to the rector of *Marsh*

1770. *Marfb Baldon* in right of that part of the said estate which lay therein; and insisted, that such part of the said estate as was become vested in her as heir to him, ought to be held free and exempt from the payment of all the tithes, save as aforesaid. She also insisted, that the said *Hatchett Close* and other the lands part of the said *Little Baldon* estate vested in her, had been ever since held free from tithes save with respect to such rights as the rector of *Marfb Baldon* had to such part thereof as lay in his parish, and except such of the tithes as had been separated and sold therefrom; and insisted that as no tithes whatsoever, save as aforesaid, had since been paid to the impropiator of the rectory of *Foot Baldon*, they were not obliged to discover, whether any were paid to the rector of *Marfb Baldon*; and that all the small tithes in general of *Marfb Baldon* lands, and all the corn and hay tithes arising therefrom, which had been usually enjoyed by the rector of *Marfb Baldon*, still remained due to him as before the said sale or exchange of lands.

The defendant *Bacon* admitted, that the defendant *Martin*, during the said years, had held the *Hanging Lands* lying in *Marfb Baldon* by lease from him, and that some hay and other tithes arose therefrom; but he insisted that the plaintiff was not entitled to hay, or any tithes arising thereon, except of corn, but that the same belonged to the rector thereof; that they had constantly and immemorially been enjoyed by the defendant and his predecessors; and that, as rector of *Marfb Baldon*, he was entitled to all the small tithes, and also to certain portions or parcels of the great tithes arising therein, and also to the said modus or composition of 14l. *per annum*, in lieu of the hay and all small tithes, and the greatest part of the corn tithes arising on the *Manor Farm*, and also to all hay tithes arising within the said parish (save of certain lands held by the plaintiff from *Queen's College* in *Oxford*, called *Durham Sees* and *Spindlers*), and also to all other tithes whatsoever, (except such parts or portions of the great tithes as had been usually held and enjoyed by the plaintiff and those whose estate he had), whether the same belonged to him by the first endowment of the said church, or by any subsequent gift, grant, endowment, prescription, permission, right, title, or claim whatsoever; that the general and unappropriated part of the said rectory of *Marfb Baldon* was vested in him by his institution and induction thereto; and that all new tithe arising therein, whereof no sufficient enjoyment had been had to fix
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the right thereto, belonged to him as general rector of the said parish.

The defendants *Cox* and *Martin* said, they held the said farm and lands as before-mentioned, and put in the like answers; and insisted, that the plaintiff was not entitled to the tithe in kind of hay, or any thing in lieu thereof; but believed, that the defendant *Bacon*, as rector of *Marsh Baldon*, was entitled to all tithes arising on the demesne lands of the manor of *Marsh Baldon*, and also to all manner of small tithes, or to some composition for the same; that the *Manor Farm* was part of the demesne lands of the said manor; and that an ancient composition of 14 l. *per annum* then was and had been yearly paid by the owners of the said *Manor Farm*, or their tenants, to the rector of *Marsh Baldon*, in lieu of all tithes arising therefrom.

The defendant *Sarah Cox* admitted, by her answer, her brother's death; and that she was executrix, and had sufficient assets, &c.: and the defendants set forth the several species of tithes they had upon their said lands.

The defendants *Bacon* and *Lane* filed their cross-bill against *Yateman*, setting forth the several matters mentioned and insisted on in their answers to the original and amended bill; and praying, that a trial at law might be directed to ascertain the right to the tithes claimed by *Yateman*; that the conveyance made by *Lewis Pollard* to *James Jennens* of the rectory impropriate of *Foot Baldon* and the said impropriate tithes of *Marsh Baldon* particularly described and set forth in the said bill; and also the agreements, articles, and deeds of exchange of lands, part of *Little Baldon Farm* and of the tithes thereof, might be produced at such trial, and likewise at the hearing of the cause; that *Yateman* might be restrained by injunction from proceeding in the mean time against the tenants of the plaintiffs and other inhabitants of the parish of *Marsh Baldon* for the tithable matters in dispute in the said cause; and that the plaintiffs might be quieted in the possession of their tithes according to their respective rights therein; and particularly that the right of the plaintiff *Elizabeth Lane* might be established in the tithes of her lands late part of *Little Baldon Farm*, which had not been sold or conveyed to *James Jennens* or to other persons under whom *Yateman* claimed; and also in all other lands and tithes which had been conveyed to her ancestors in lieu of the said *Little Baldon* tithes and lands.

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The defendant *Yateman* admitted, that *Elizabeth Lane* had been several years seised of some estate of freehold of and in the manor of *Marsh Baldon*, and also of *Hatchett Piece*, *Hatchett Close*, the *Knowle*, the *Great Monk Hill*, and part of *Little Monk Hill*; but said, that he did not know that they were part of *Little Baldon Farm*, excepting *Hatchett Piece*, which he admitted was part of the said farm. He also admitted, that the parish of *Baldon* comprehended the several townships aforesaid; that the rectory of the said parish formerly belonged to the monastery of *Dorchester* in the county of *Oxford*; that afterwards the township of *Marsh Baldon*, which had a church or chapel, acquired the reputation of a parish; that the said church or chapel was originally endowed by the lord of the manor of *Marsh Baldon*, who had always presented an incumbent thereto; that *Elizabeth Lane* had, as lady of the said manor, presented the plaintiff *Bacon* to the said church or chapel; that he was thereupon instituted and inducted thereto; that he thereby became entitled to the tithes of the *Manor Farm*, and of certain other lands within the said township, of which the chaplain of the said chapelry was thencefore endowed; but not to all tithes, tenths, and oblations whatsoever, or to such tithes as were insisted on by the plaintiff *Bacon*. He insisted, that *Lewis Pellard*, in the 14th year of the reign of *James* the first, then impropiator of the rectory of all the *Baldons*, demised the same for 99 years to *William Allen*, by the description of "all that rectory or rectories, parsonage or parsonages, of *Foot Baldon*, *Saint Lawrence Baldon*, and *Marsh Baldon*, with the tithes thereof, and three acres of arable lands lying in the fields, parcel of the glebe lands of *Baldon*, except the tithes of *Little Baldon*, and of one tenement, and of one yard land in the tenure of *P. Shurle*; and such tithes as had been enjoyed by *R. Humphreys*, clerk, then incumbent of the said chapel of *Marsh Baldon*, for 20 years then past;" that he afterwards conveyed the reversion thereof to *James Jennens*; and that he had become entitled to the said rectories by a regular course of conveyance from the said *James Jennens*. He also insisted, that in 1293 *Peter de la More*, then lord of the manor of *Marsh Baldon*, presented *Hugh de Barkington* to the chapel of *Marsh Baldon*; and that it was twice afterwards presented to as a chapel; but he admitted, that before the dissolution of the monastery of *Dorchester*, and since that time, it had been presented to as a church; and that *Marsh Baldon* had been reputed to be a parish, and the church a parish

church, and an ancient rectory in reputation, and had been reputed to be separate and distinct from *Foot Baldon*, *Saint Lawrence Baldon*, and *Little Baldon*. He also admitted, that the plaintiff *Bacon* was presented to the cure of *Marsh Baldon*, under the name of the rectory and parish church of *Marsh Baldon*; but he insisted, that there was no such ancient parish church as *Marsh Baldon*; or that if there was, that the same was not a rectory, but only a ward or township with the rectory of *Baldon*, and a chapelry belonging to *Baldon* rectory; and that he was not rector of the said parish, but only curate thereof under him; and that the presentations of a clerk to the said church or chapel of *Marsh Baldon*, under the name of a rector, were done without the concurrence of the then owner of the said rectory of *Baldon*, and could not deprive him of any part of his said rectory; and he claimed the whole tithes of the said parish (except such tithes within *Marsh Baldon* as the plaintiff *Bacon* could shew a right to by grant or prescription), under the words of the conveyance from *Lewis Pollard* in 1626, and as a general impropiator thereof. He admitted, that the inhabitants of *Marsh Baldon* had, for many years, baptized their children in the church or chapel of *Marsh Baldon*, and had buried their dead in the chapel or church-yard there; but insisted, that such privileges were enjoyed by other chapelries to ease the inhabitants from carrying their children and dead to the rectorial church, and was not any evidence of an independant church or rectory. He also admitted, that *Foot Baldon* and *Saint Lawrence Baldon*, with the greatest part of *Little Baldon*, paid parochial rates together, and maintained their poor separate from *Marsh Baldon*; and that *Marsh Baldon*, with small portions of *Little Baldon*, were also rated together separate from the other *Baldons*. He insisted, that the said *L. Pollard* was, in 1626, also seised of the said farm and estate called *Little Baldon*; and admitted that *John Danvers*, father of *Sewan Danvers*, was at the same time seised of the said manor and manor farm of *Marsh Baldon*; that, as lord of the said manor, he had a right of presentation to the said church or chapel; and that the said *Robert Humphreys* was then incumbent thereof, and held and enjoyed all the glebe lands and tithes with which the said chapel had been endowed. He said, that he believed that the said *L. Pollard*, or *J. Pollard* his son, who intermarried with the said *S. Danvers*, afterwards sold the whole, or the greater part of *Little Baldon*, with all tithes arising therefrom; but whether on the sale thereof, and of the said estate occupied by the said *Shurle*, they made any reservation

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servation thereof, or of any of the tithes thereof, from the defendant, he knew not; but admitted, in case any part of the said estates or tithes were reserved, the same descended to the plaintiff *Lane*, grand-daughter of the said *J. Pollard*. He further insisted, that after the sale of the said rectory to the said *J. Jennens*, the said *L. Pollard*, and also the purchasers of the said estate claiming under him, had held and enjoyed *Little Baldon* estate free from the payment of tithes, except such parts and tithes as had been since separated therefrom. He admitted, that the plaintiff *Lane* had, for many years, held lands free from the payment of tithes; and insisted, that such lands were part of *Little Baldon* estate, and some of the lands whereof the said *L. Pollard* reserved the tithes on the sale of the said rectory; but he admitted, that such lands and tithes, not having been sold with the rest of *Little Baldon* estate, had descended to her, as heir of the said *L. Pollard*; but whether such lands were part of *Little Baldon* estate, or exempt from the payment of tithes, he could not set forth. He insisted, that divers agreements and conveyances had been executed between the said *L. Pollard* and *J. Pollard*, and those claiming under them, with other persons proprietors of lands in *Baldon*, and divers exchanges made of land, parts of *Little Baldon Farm*, for other lands belonging to such other persons; and that the tithes of the said lands were also exchanged with the said *J. Jennens*; and that by means thereof the tithes of the said lands were separated from lands themselves, and belonged to him as claiming under the said *James Jennens*. He admitted, that he claimed the tithes of all hay arising on the said lands late part of *Little Baldon Farm*, or on the lands taken in exchange for the same; and that in 1759 he ordered his tenant to take tithes of hay arising on all the lands in *Marsh Baldon* whereof he was entitled to the corn tithes when the same were sown with corn, and particularly on *Smith's Piece*; that his tenant took away part of the grass mowed on the said piece as the tithe thereof, without the tithe being properly set out; that an action of trespass was brought against his tenant; and, as the said tithe had been irregularly taken, he suffered judgement to go by default. He insisted, that all tithes on *Smith's Piece* and the several other pieces of land tithable in like proportions, and which had been regularly set out and marked as tithe, had, from time to time, been enjoyed by the defendant and his tenants of the said rectory of *Baldon*, and by the several owners and occupiers thereof, ever since such proportion and mode of tithing had been established.

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The plaintiff in the original cause replied; the defendants rejoined; witnesses were examined on both sides: the plaintiffs in the cross cause replied; and the defendant rejoined; but no witnesses examined on either side.

By an order made in the cross cause, it was ordered, that the plaintiffs should be at liberty to read on their behalf the depositions of the witnesses in the original cause.

It is stated, that the plaintiff gave in evidence, that the inhabitants of *Marsh Baldon* attended the visitation of the church of *Dorchester*, visitable, as a donative peculiar church, by its patron *Thomas Fettiplace* esq. or his official, as well as the inhabitants of the other *Baldons*, in acknowledgment of such church being their original parish church or mother church; and also, that the presentations had not ever, from time immemorial, been to the time of king *John*, and after the year 1209, to the chapel of *Baldington*, on condition of residence and payment of a pound of frankincense to the mother church of *Dorchester*, and that it appeared not to have any tithes or spiritual property belonging to it in the year 1291; and the word rectory was matter of addition subsequent to the demise to *Allen*, 14 Jac. 1. and the exception therein contained; and that the presentation for a long series of years after its foundation, was to the chapel, afterwards to the church, then to the parish church, as set out in the plaintiff's bill, and not before 1619, to the rectory; and that there was no such field as *Marsh Baldon* field, but that all the tithes in question arose out of *Baldon Field*, and no possibility of perambulation, without taking therein the whole circuit of such field.

On the part of the defendants, it is stated, that it appeared in evidence, that the church of *Marsh Baldon* never was appropriated to the monastery of *Dorchester*, although *Tost Baldon* might have been so; that the abbot of *Dorchester* never interfered therein, but in one instance in the year 1368, when he acted in his capacity of archdeacon of *Dorchester* only, upon being written to by the then bishop of *Lincoln*, to admit *Patrick Swayne* to the church of *Marsh Baldon*, (*ad ecclesiam de Mers Balhynden*) and institute him rector thereof, which he certified that he did accordingly as archdeacon; and that the same was done by the abbot, as official only to the bishop, appeared from another instance in the year 1381, when a like return was made by the abbot of the monastery of *Oseney* as archdeacon of *Dorchester*, to a mandate of the then bishop of *Lincoln*, whereby he certified, that he had instituted *Thomas de*

1770. *Thornton*, who had been presented by *Peter de la Mere* to the same church, (*ad ecclesiam de Meres Baldyndon*) ; that from the year 1209 to the year 1539, when the greater monasteries were dissolved (of which *Dorchester* was one), and down to the year 1735, when the present incumbent was instituted, and particularly at the time of the dissolution of monasteries, the advowson was interruptedly in lay hands ; for that in the year 1533, which was six years only before the dissolution, the same was presented to by the trustees (*recuperatores*) of Lord *Windsor* ; and in 1 *Edw.* 6. (1547) which was 14 years after, Lord *Windsor* granted a lease of the manor of *Marsh Baldyndon*, and the patron's acre, and the advowson of the said church ; that although there were some instances between the year 1209, and 1361, of the same having been presented to as a chapel, yet most of the institutions are as rector ; and it appeared that in those ages the term church or chapel were deemed synonymous, for that in the year 1371, *Marsh Baldon* was presented to as a church, and in 1372, as a church or chapel ; and that in a deed of exchange, made in the year 1370, between *John Hadesball* who is therein styled rector ecclesie de *Mers Baldyndon*, with *John Dagat*, the vicar of *Saint Nicholas Abingdon*, the latter is styled vicar of the parish church or chapel of *Saint Nicholas in Abingdon* ; that from the year 1465 down to the present time (about 300 years) the said living had been uniformly presented to as a rectory and parish church ; that in the crown survey taken 26 *H.* 8. about four years before the dissolution of the greater monasteries, *Marsh Baldon* is called a rectory, and *John Hutchinson* the rector thereof, and that as such it is charged to the first-fruits and tenths ; that in the year 1626, when *Lewis Pollard* sold to Mr. *Jennens* (under whom the plaintiff claims) the impropriate rectory of *Toot Baldon*, the manor and rectory of *Marsh Baldon* was in *John D'Anvers*, and did not come into the family of the *Pollards* till 1635, (being nine years after) upon the marriage of *John Pollard*, the son of the said *Lewis*, with *Susan D'Anvers* the heiress of the *D'Anvers*, the ancestor of Mrs. *Lane*. It was proved by depositions, that *Marsh Baldon* and *Toot Baldon* are considered as distinct manors, the first belonging to Mrs. *Lane*, the last to *Queen's College, Oxford* ; that each has a church of its own, that *Marsh Baldon* enjoys the administration of the sacraments and sepulture, keeps its own poor, and has all other marks of a parish ; and there was a good deal of evidence to shew that Dr. *Bacon*, or his tenant, has uniformly taken the lay tithes, and other the tithes which the plaintiff now claims. On the other hand,

band, the defendants admitted that there was some parol evidence, on the plaintiff's part, to controvert Dr. Bacon's right thereto. 1770.

This cause came on to be heard before the Barons of his majesty's court of Exchequer, at *Westminster*, 26th November, and continued hearing 10th, 11th, 12th, and 13th December 1770, on the last of which days the court was pleased to order and decree, that the original and amended bills, bill of revivor, and supplemental bill filed by the plaintiff, should be dismissed out of the said court, with costs.

This decree was afterwards reheard, and affirmed: whereupon the plaintiff appealed to the House of Lords, and prayed a reversal for the following reasons:

1st, Because it appears, from conclusive evidence, that the presentations have not from time immemorial been to the rectory and parish church of *Marsh Baldon*; but, on the contrary, for a long series of years, within time of memory, the same hath been presented to by the name of a chapel, which was founded by some lord of the manor of *Marsh Baldon*, and by him endowed with a temporal revenue, and that *Dorchester* is its mother church.

2d, For that it appears, that the rectory or spiritual profits of the whole peculiar of *Dorchester*, belonged to the church of *Dorchester*, as its mother church, and that such church of *Dorchester* is rated in respect thereof in the taxation of spiritualities in 1291.

3dly, That it appears, that the general name of *Baldon* includes all the several townships of *Baldon*, and that *Baldon*, including therein all such townships, is parcel of the peculiar of *Dorchester*, and, as such, partel of the possessions of the said monastery of *Dorchester*, at the time of its dissolution.

4thly, For that it appears, that on the dissolution of the monastery of *Dorchester*, the crown granted the rectory or spiritual profits of *Baldon* generally, parcel of the spiritual profits of the church of *Dorchester*, to the person under whom the appellant claims, and that in a regular course of descent he is entitled thereto, except such matters parcel thereof as are excepted thereout by *Lewis Pollard* in his conveyance to *Jennens*.

The reasons urged by the respondents in support of the decree were as follows:

1st, The appellant, by claiming in his last amended bill, as general rector, has brought the question between him and the respondents, to the single point, Whether *Marsh Baldon* is a parish and rectory, or only a township and chapelry? It appears from the

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evidence, that it has been uniformly presented to by the name of a church (*ecclesia*, which signifies the parsonage with its whole endowment), and the incumbent styled rector from the year 1465 to the present time; and that it was considered as a church for a century before, now for a space of four hundred years: the mode of presentation proves this; for had it been a chapel, the patron would have presented the clerk to the impropiators, and they would have admitted him; whereas it appears he was presented to, and instituted by, the bishop or his official: it has the characteristics of a parish church, in having baptism and sepulture: there is no proof, on the part of the appellant, of any subordination of it to *Toot Baldon*, as a mother church; no right to seats there; no contribution to the repairs thereof; no resorting thither, as to a mother church, on stated days; no oblations paid; no oath of obedience to the rector or vicar as required by ancient canons; it keeps its own poor; stands in a different deanery; in fine, it is in no instance dependent thereon: the survey of King H. 8. and payment of first-fruits and tenths, is decisive evidence on this point.

2dly, But the appellant insists, that because it appears to have been presented to as a chapel from the year 1209 to 1320, (which is within the legal time of memory) it could never afterwards gain the right of a church; and that it was pensionary to the church of *Dorchester* in a pound of frankincense, which shewed it to be subordinate thereto. In answer to this it is submitted, that the absolute distribution of parishes, as they are now, was not at that time fixed; that in those ages the terms church and chapel were synonymous; that a *quare impedit* lay for a chapel, as well as a church, before the year 1285; that a church may be presented to, as a chapel, and yet remain in right a church; and, on the other hand, a chapel may commence a church by presentation to, and institution in it, as such; and that no argument can be drawn from any such pension; for that may be payable, without inferring subordination, from church to church, abbey to abbey, by decree, agreement, gift, or deed.

3dly, The appellant claims this rectory of *Marsh Baldon* as included in the grant from the crown in king Henry the eighth's time, by the general description of "the rectory of *Baldon*, late parcel of the monastery of *Dorchester*." This may be applicable to the rectory of *Toot Baldon*, which was appropriated to the monastery, but can by no means include *Marsh Baldon*, which is clear never was appropriated to that, or any other ecclesiastical body, but remained in lay hands from the year 1272.

the present time ; nor could *Lewis Pollard*, by his grant to *James Jennens* in 1626, by any amplified words or description, pass more than what was included in the original grant from the crown, or affect the rector's right. Besides it appears *Lewis Pollard* never had any estate or interest in the manor or advowson of *Marsh Baldon*, and that the same did not come into his family till the year 1636, (ten years after that grant) upon the marriage of his son *John Pollard* with the heiress of the *D'auvers*. Had the appellant been rector, he would not have been contented with taking only one fifteenth of the corn tithes, when he was entitled to one tenth.

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4thly, As to the smaller questions of right claimed by the appellant to the hay tithes, or *Smith's Piece*, and other pieces, or the tithe of the commons, or the furze, they are in this cause now absorbed in the great question of rector ; and if the appellant can support any claim thereto respectively, it must be by some other means than the present suit.

The House affirmed the decree.

* H. 3 Geo. II. A. D. 1729. Scac.

Brown v. Barlow. [MS.]

IN this case it was agreed by the counsel, that where there is a composition between parson and occupiers, and the money paid and accepted during the incumbent's life, yet, upon his death, the successor may sue in this court without notice that he refuses the composition, because it determined by the death of the incumbent who made it, and the successor may continue or wave it at his election. But if, upon coming to the living, he accepts the composition, that will amount to a confirmation so far as to oblige him to give notice of his renouncing it, and demanding tithes in kind, before he brings his bill here : otherwise, the occupier, making a tender of the money before the commencement of the suit, and offering by his answer to pay it, shall not be liable to costs, but in most cases will be entitled to his costs from the parson, if he relies on the tender for his defence.

Composition between parson and parishioners : how far binding on the succeeding incumbent.

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P. 11 Geo. III. A. D. 1771. B. R.

Law v. Ibbetson. [5 Burr. 2722.]

It is no defence to an action against an archdeacon for non-residence in his parsonage-house, that he resided within the limits of the archdeaconry, there being no archidiaconal house.

IN debt upon the statute of 21 H. 8. for non-residence, the defendant pleaded the general issue. Upon the trial a verdict was given for the plaintiff for 10 l. subject to the opinion of the court upon the following case :

The defendant beneficed with the rectory of the parish church of *Bushey* in the county of *Hertford*, to which there is a good parsonage-house belonging, during all the time mentioned in the declaration, performed the duty of rector of the said parish, but was personally resident in and upon a dwelling-house belonging to himself in *Bushey* in the parish of *Bushey*, and not in and upon the said parsonage-house belonging to the said rectory. The defendant also, during all the time aforesaid was and still is archdeacon in and through the whole archdeaconry of *St. Albans* and the limits thereof; which is an ecclesiastical dignity, with jurisdiction of granting licences for marriages, probate of wills, and letters of administration. He has a seat in the church of *St. Albans*; has a deputy-registrar who lives at *St. Albans*, and keeps an office there; but the seal of office is kept by the defendant in his own custody; to whom the said deputy-registrar applies for the use of the seal, and the dispatch of business. The house in which the defendant was and is resident and abiding is within the limits of the said archdeaconry, (as is also his rectory-house), but is not belonging, nor is there any house which does belong, to his archdeaconry, as an archidiaconal house.

The question for the opinion of the court was, Whether, under these circumstances, the plaintiff is entitled to recover ?

It was argued on the part of the plaintiff, that the single question was, Whether the defendant had kept a personal residence and abode at, in, and upon, either his dignity or his parsonage : that there being no house belonging to his archdeaconry was no excuse for his not residing in the parsonage-house belonging to his benefice : that he must be personally resident upon one or the other : that an archdeaconry is one of the dignities expressly mentioned in the act of 21 H. 8. c. 13. which act was not introductory of a new duty ; for that residence was requisite both by common law and in common sense, 2 *Infl.* 625-6. *Reg.* 58 b. : that non-residence was a perpetual

tual subject of complaint from the time of *H. 3.* to that of *H. 8.*: that in the case of *Butler v. Goodale*, 6 *Rep.* 21. (and *supra* 204.) upon an information on this statute it was resolved by the court, "that the parson ought to abide on his rectory, that is, upon his parsonage-house, and not in any other house, although it be within the same parish:" that a suffragan would have been bound before 25 *H. 8. c. 19. § 7.* to reside upon his parsonage or vicarage; and so is a bishop holding in *commendam*, *Watf. c. 37.* And *Hob. 16.* says, "that an archdeacon derives his power from the bishop."

It was answered by the defendant's counsel, that if the defendant had not complied with the canons, he was open to the canon-law: that it was enough if he resided either upon his dignity of his benefice: that he did reside within the limits of his archdeaconry; which is sufficient, as there was no house belonging to it: that the case of *Butler* and *Goodale* was not determined by the unanimous opinion of the court: and in *Canning v. Newman*, 2 *Brownl.* 54. (*supra* 365.) there was a difference of opinion on the bench. That an archdeaconry is a dignity within this act of parliament, *Broughton v. Goufley*, *Cro. Eliz.* 663. (n)

Lord Mansfield, after reciting the words of the act, said, The determinations upon adjudged cases are, that if the parson does not reside upon his dignity or benefice, he is within the penalty: and that, if there be a house upon the parsonage or dignity, he must reside in that house; it not being sufficient to reside in any other house, though it be within the parish. If there be no house, then indeed he may

(n) This was an information on the statute 21 *H. 8.* for non-residence. The defendant pleaded, that he was chosen *Gospeller* in the church of *St. Paul's London*, and was resident there by reason of that dignity: and it was thereupon demurred. It was argued by *Waterhouse* for the plaintiff, that this was not any dignity to excuse the defendant: that the civilians divided spiritual functions into three degrees: 1st, Function which hath a jurisdiction, as bishop, dean, &c. 2dly, Spiritual administration with a cure, as parson of a church, &c. 3dly, They who have neither cure nor jurisdiction, as prebendaries, chaplains, &c.: that they defined a dignity to be *alministratio ecclesiastica cum jurisdictione vel potestate conjuncta*, and thereby exclude the two last degrees from being any dignity; a *multo fortiori* the common law doth so; as 27 *H. 6. 5. 25 E. 3. 41. 24 E. 3. Br. Nofm.* 25. that an archdeacon is not a name of dignity: and 11 *H. 4. 10.* that a parson is not a name of dignity: 17 *E. 3. 31.* a provost is not a name of dignity: 14 *H. 6. 14.* a precentor is not a name of dignity: 27 *H. 6. 3.* a chaplain is not a name of dignity: and 27 *H. 8. 10.* is, that if a vicar of *St. Paul's* hath a benefice with cure, he ought to be resident upon it; and that is a greater dignity, than that of *Gospeller*. And of this opinion were *Popham* and *Clench*, *ceteris judicariis absentibus*, that it was not a dignity within the statute. But they would advise upon hearing the defendant's counsel; *et adjornatur*. Afterwards the defendant compounded.

1771. reside where he will, provided it be within the parish; for he cannot, upon a penal act, be punished for not residing in the house, when there is no house to reside in. Residence is a technical term: the parson must shew that he was resident within the technical sense under the act of parliament. The plaintiff must have judgment.

Aston J. was of the same opinion.—He considered residence as a technical term: that it must be in the house if there be one. The defendant is here charged with having absented himself from his rectory and from his dignity, and resided elsewhere. This was inserted in the declaration in order to shew, that the defendant was not so resident, as the enacting part of the statute requires. The not having it in his power to keep residence upon his archdeaconry because there was no house, cannot excuse him for not residing upon his parsonage, where there was a house. This excuse goes no farther than to his not residing where there was no house to reside in. This case ought to be considered in the same manner as if the archdeaconry and the parsonage had been a hundred miles distant from each other.

Willes and Ashhurst J. of the same opinion.—Judgement for the plaintiff.

[In this term the case of *Townley v. Tomlinson*, respecting the exemption claimed under the *Præmonstratenses*, was again brought before the court. It had, in a somewhat differently shaped defence, received the judgement of the court in Tr. 2 Geo. 3. Since the part of the work which related to that period was printed off, I have discovered some of the passages of that case, which, with so much of the pleadings as respects the above exemption, I shall insert before I proceed to give any account of the suit which arose in the present term.]

* Tr. 2 Geo. III. A. D. 1762. Scac.

Townley v. Tomlinson. [MS.]

A title to hold lands discharged of the payment of tithes absolutely, or even whilst in the maintenance of the owners

BILL by the plaintiff, as impropriatrix of a moiety of the great and small tithes of the township of *Pilling* in the parish of *Garstang* in *Lancashire*, for an account of tithes.

The defendants by their answer admitted, that they had during the time charged in the bill several tithable matters on their lands in *Pilling*: but they said, that the several messuages and lands by them

of the inheritance, cannot be derived under the order of *Præmonstratenses*.

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occupied were parcel of the possessions of the abbey of *Cockersand*; that the said abbey was one of the greater monasteries; that it came to the crown by virtue of the statute 31 H. 8.; that it had been a monastery and abbey beyond memory; and that all, or the greater part of the lands in *Pilling*, were parcel of the possessions of the said abbey; that some of those lands, viz. the messuage called *The Abbey House*, *The Moss*, *The Mill Pasture*, and *The Barn Farm*, were part of the ancient demesnes of *Pilling*; that they were before and at the time of the dissolution of the monastery enjoyed by the abbot and convent thereof free from the payment of any tithes or ecclesiastical dues, or of any modus in lieu thereof, whether such lands were in the immediate possession of the abbot and convent, or of their farmer; that the farm or tenement in *Pilling*, belonging to *Roger Hesketh*, then in the tenure of the defendant *France*, and the messuage called *Pillinghall*, in the tenure of *Henry Threlfall*, had never paid any tithe in kind or any *Easter* offerings; but that each of those tenements had immemorially paid a modus of 10 s. a-year in lieu of all the tithes and *Easter* offerings yearly arising thereon respectively; that all the other lands in *Pilling* (except those before mentioned to be exempt, as having been abbey lands, and those before mentioned to be discharged by moduses) were held by the abbot and convent of the abbey of *Cockersand*, before and at the time of the dissolution thereof, discharged from the payment of any tithes or ecclesiastical dues, or any modus in lieu thereof, when the same were in the immediate possession or occupation of the abbot and convent, and not let to tenants; for that the abbey was founded before the council of *Lateran*, and the abbot and convent of the *Premonstratensian* order were, by virtue of their order, freed in respect of the said last-mentioned lands from the payment of any tithes or ecclesiastical dues whilst the said lands were in the occupation of the abbot and convent, and were not let to tenants or farmers; and they insisted that the lands which they respectively occupied, together with the other possessions of the abbey, did, by surrender made by the said abbot and convent unto *Henry* the eighth in the 30th year of his reign, and the said act of parliament or one of them, become vested in the said king, his heirs and successors, discharged from the payment of tithes, in the same manner as when they belonged to the abbey. They further stated, that the said king, by his letters patent dated the 1st of *September*, in the 35th year of his reign, granted to *J. Kitchen* and his heirs "all that the site of the house or mansion of the late monastery,

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monastery, and all those crofts and arable lands and three closes of moor called, *Mill Pasture*, *Moss Close*, *Beggars Close*, and *Pilling Grange*, and all and singular the demesne lands of the monastery of *Cockersand*, and then late in the occupation or culture of the late abbot of the said monastery at the time of the dissolution thereof, to hold the same to him, his heirs and assigns, in as ample manner as the said last abbot, or any of his predecessors, held the same ;” and they therefore insisted, that the said messuages and hereditaments were entitled to the benefit of the same exemption as that under which the said abbot held the same before the dissolution : and they averred, that they believed that the said messuages and hereditaments were exempt from payment of tithes and other ecclesiastical dues, whether in the hands of the owners thereof, or when let to tenants, as they had never, within the memory of man, paid any tithes or ecclesiastical dues whatever, nor had any such ever been claimed, whether the said lands were in the occupation of the owners of the inheritance thereof, or were let to tenants ; and that such non-payment is evidence of exemption. They further said, that the remainder of the lands in *Pilling* (except those discharged by modus aforesaid) were exempt from the payment of tithes and other ecclesiastical dues, or of any modus in lieu thereof, when in the hands and occupation of the owners of the inheritance thereof ; and that such remainder of the said lands being extensive, and the inheritance thereof, until 60 or 70 years last past, being vested in a very few persons, who lived at a distance, and who had leased the same for lives or years, the tenants thereof were liable to pay tithes for such lands, and had accordingly paid the same. They then set forth several moduses for their other lands in *Pilling*.

The plea was followed by a replication and rejoinder ; witnesses were examined on both sides ; and a great body of written evidence was laid before the court.

Parker C. B. in delivering his judgement (o), said, that he should not speak to the absolute discharge, because given up at the bar ; or, if not, most clearly destroyed by the decree in 24 *Eliz.* in the cause of *Kitchin v. Holme*, which had been read in evidence. That the principal question was, Whether the lands in *Pilling* are discharged from the payment of tithes, as being parcel of the possessions of

Vide infra.

(o) Note.—Upon this occasion a very elaborate argument was delivered in the Exchequer-chamber by Mr. Baron *Gault* ; but the notes of it, which I have seen, are too obscure and imperfect to be committed to the press. Nor do I affect to give any more than some of the heads of Lord C. B. *Parker*’s argument.

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the abbey of *Cockersand* of the *Præmonstratensian* order, whilst in the occupation of the owners of the inheritance, by virtue of the statute of 31 H. 8. ? *Innocent* the third, he said, published a Bull or Decretal Epistle dated 6 Kal. Aug. Indictione prima Anno 1198, Anno Pontificatus sui primo, wherein he confirms the order of *Præmonstratenses*, settles and establishes rules for their conduct, garments, and other necessities; and then follows these clauses. “*Porro nulla persona ecclesiastica pro chrismate, aut consecrationibus et ordinationibus, aut pro sepulturâ, pretium, aut pro benedicendo Abbate, et deducendo in sedem suam, palefridum aut aliquod aliud a vobis exigere, nullus vestrum, etiamsi exigatur, dare, præsumat: quia et exigentem et dantem nota et periculum simoniacæ pravitatis involvit.—Sanè laborum vestrorum quos propriis manibus aut sumptibus colitis, sive de nutrimentis vestrorum animalium, nullus à vobis decimas exigere vel extorquere præsumat, licet fundorum dominis pro rei proprietate aliquem censum vel quotamlibet partem reddatis.*” *Epistolæ Decretales Innocentii tertii*, published by *Baluzius*, Tom. 1. *Epist.* 331. p. 186. 188. of the edition at *Paris* in 1682. According to *Banks’s* argument in the case of *Dickenson v. Greenhill* in *Sir Henry Calverley’s MS. Reports* (*supra* 409.) this privilege appears by the leger-book of the abbey to have been allowed in 12 E. 3. and a definitive sentence given accordingly. Mr. *Selden* in his *History of Tithes*, c. 13. p. 406. is express, that they are exempted by this Bull for lands of their own culture. And *Watson’s Clergyman’s Law*, c. 48. follows Mr. *Selden*, only mistakes pope *Clement* for pope *Innocent* the third. But, notwithstanding all this, nothing can be clearer, than that this Bull will not exempt this order from payment of tithes for lands in their own occupation, unless it was received and allowed in *England*, Lord *Hale’s History of the Common Law*, 29. *Keilw.* 181. 184. *Popb.* 157. *Old Bennl.* 164. and no allowance is shewn in any court. So far from it, that according to Mr. *Noy’s* argument in 2 *Ro. Rep.* 479. (*supra* 403.) when an abbot of this order came to do homage, the marshal took his alfreys from him, contrary to the express letter of the Bull. It is true, that the *Cisterians*, *Templars*, and *Hospitallers*, are discharged of tithes of lands in their own occupation by the general council of the realm. *Dy.* 277. (*supra* 232.) *Dobitost v. Courteen, Cro.* 454. (*supra* 287.) *Hudr.* 101. *Gibf. Cod.* 701. *Stillington’s Ecclesiastical Cases*, vol. 1. 305. But the books are silent as to the allowance of this privilege to the order of the *Præmonstratenses*. In the present case it appears by the minister’s accounts from *Michaelmas* 30 to *Michaelmas* 31 H. 8. and the record out of the augmentation-

1771. augmentation-office (p), that those lands were purchased by *Kitchin* as subject to tithes. In the case of *Bradshaw and Clifton* *, 26 June 1678, (the decree in which has been read in evidence), it was decreed by the court, that the order of *Præmonstratenses* is not discharged of tithes as an order. In that case there was a re-hearing 17 Nov. 1679, and upon the re-hearing the principal counsel in *Westminster Hall* were concerned; and yet in regard the defendants failed in making out their exemption for the lands *dum propriis manibus excolebantur*, it was disallowed, and they were decreed to account for the tithes demanded by the bill. The case of *Lambert v. Cummin*, 21 Nov. 1723, in this court, seems to be abandoned by the defendants themselves; for there an absolute exemption was insisted upon, and the bill dismissed; but here the absolute exemption is given up at the bar, as has been already observed.

*Vide infra.

The bill therefore must be dismissed as to the defendants *Benison* and *Alderson*, and the defendants *Dickinson* and *Hodgson*, with costs according to the course of the court. But, in regard that it does not appear, nor has been made out by the proofs in the cause, that the said lands in *Pilling*, for which an account of tithes is prayed by the bill, were or are exempted or discharged from the payment of tithes, when in the immediate or actual possession or occupation of the respective owners of the inheritance thereof, the other defendants must severally account with the plaintiff for a moiety of the tithes of the lands in their respective occupation and other matters, (for which no modus is insisted upon by any of the defendants' answers), for the year 1757 and the subsequent years, with costs to this time, but subsequent costs must be reserved. The several moduses must be tried with the usual directions for the trial, and costs must be generally reserved in respect thereof, and all further directions, with liberty for any of the parties to apply to the court, as there shall be occasion.

(p) In the records of the augmentation-office relating to the possessions of *Cockerfeld* abbey, is enrolled (among other things) the proposal of *John Kytchin* to purchase the possessions of the said abbey in *Garfang*, and under his proposal is a rental of the particular tenements and lands which he proposed to purchase, among which are the lands of *Pilling*, consisting of nine tenements, with the names of the tenants and yearly value of each. The first-named tenant in *Pilling* is the wife of *John Richardson*, who is named in the decree of 24 Eliz. (*infra*) and she held a tenement at 3 s. 4 d. a year rent. At the close of this proposal is the certificate of the officers of the crown, as to the value of the lands so proposed to be purchased; and it concludes thus, viz. "Summa totalis 38 l. 9 s. 10 d. The clear yearly value of the premises is 38 l. 9 s. 10 d. Indè pro decimâ 77 s. 0 d. Et sic remanet clarè per ann. 34 l. 12 s. 10 d. which, to be purchased at 23 years purchase, amounts to 796 l. 15 s. 2 d. Add hereto for the woods 1 l. 13 s. 4 d. and then the whole sum is 798 l. 8 s. 6 d. To be paid in hand 400 l. and the residue in three months."

* Termin° Pasche, A° 24° Eliz.

Jovis x° die Maii,

Inter Janam Kychin Firmar' D^{no} R^{no} Quer' Et Thoma' Holme,
Joh^{na} Jones, Petr' Dicconson, Henum Ridér, & alios, Tenentes
et Inhabitantes de Pillin in Com' Lanc. Def^{ci}.

Lanc. **W**HEREAS heretofore the said plaintiff exhibited her bill of complaint in this court, shewing thereby, that whereas she was farmer to her majesty for the term of many years enduring of the rectory and parsonage of *Garstang* in the county of *Lancaster* to the late dissolved monastery of *Cokersand* in that county appropriate and belonging, and now being parcel of the possessions of the crown, and of all tithes, oblations, obventions, profits, and emoluments to the said parsonage appertaining by lease thereof, made by letters patent by king *H. 8.* under the great seal, dated about the 36th year of his reign, by force whereof the plaintiff took the tithes of corn, grain, and hay, arising within the said rectory in proper kind, and all other tithes to the same parsonage belonging divers years: and further, by the same bill recited, that whereas the tenants and occupiers of certain lands in *Pillin* in the said county within the aforesaid rectory in the occupation of the defendants, and before the said dissolution, used for pasture, have converted the same lands to tillage, and made thereof good arable ground, and gotten good store of corn upon the same by the space of 28 years; during which time the tenants and occupiers of the same have set out and divided from the 9th part their *tithe corn* yearly renewing on the said lands and tenements in proper kind, and paid all tithes and oblations whatever due or appertaining to the said rectory till harvest the last past; that the defendants, minding to defraud the plaintiff of the said tithes of the premises by colour that the lands were discharged of tithes by reason of the unity of possession of the said rectory and lands in the hands of the said abbot of *Cokersand*, have denied to pay tithe-corn, hay, and other tithes coming upon the premises; upon which, the complainant commenced suit in the spiritual court against the said defendants for detraction of the said tithes; whereupon the defendants, upon a bill exhibited in the Chancery, obtained a prohibition; and for that the said rectory is the queen's majesty's inheritance in

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right of the crown, and that the suit tended to the disherison of her majesty, the complainant prayed, that the defendants might be called to answer the premises in this court. Upon which the said defendants for answer unto the said bill of complaint first demanded judgement, because the rectory and lands do lie in the county palatine of *Lancaster*; so that, if the premises were true, the cause is determinable in the duchy court: and further shewed and alleged that the said lands were parcel of the demesnes of the said monastery of *Cokerfund* at the time of the dissolution thereof; and that the abbot of that monastery and his predecessors time out of mind enjoyed the lands discharged of all manner of tithes; and that king *H. 8.* was seised in fee in right of his crown of the said abbey and lands by reason of the surrender or dissolution thereof, and by force of the statute made *anno 31* of his reign: by which statute it was enacted, that whereas divers abbots, priors, and other religious and ecclesiastical persons mentioned in that statute, enjoyed divers parsonages appropriate, and were discharged of tithes for their lands; that the king and his heirs, and all other persons which should have the same lands and parsonages, should have and enjoy the same discharged of tithes in as large manner as the abbots and priors of the said houses held the same at the time of the dissolution thereof: by reason whereof the said king did hold the said lands discharged of tithes until *anno 36* of his reign; that he granted the same land unto *John Kichin* in fee; by reason whereof the said *John* was of the same seised in fee, discharged of the said tithes. And further alleged, that the said *John Kichin* being landlord of the said lands, and farmer of said rectory, had not for divers years any tithes; but afterwards, that he caused his tenants to set out and pay certain corn in the name of tithe, or else to compound with him, and yet they never paid any tithe-hay; and that, after his decease, *Robert Dalton* used the same; which setting forth of tithes was in respect that the defendants were tenants of the lands. Whereunto the said complainant replied in maintaining her said bill, and the defendants rejoined in maintaining their said answers. Whereupon the same matter was at full and perfect issue, and commission was directed for the exhibition of the truth of the allegations of the titles of both the said parties in and to the premises after which, the same commission was returned into this court, and publication of the witnesses by virtue thereof exhibited by the court being orderly granted and had: and this present day being

appointed for the hearing of the same, the state of the case between the said parties did appear to be, that the abbot and convent of *Cokerfand*, in the right of his monastery, was seised in fee of the said messuages, lands, and grounds, commonly called, *Pillin*, within the rectory or parsonage of *Garflang* in the county of *Lancaster*, of which said parsonage the said abbot was parson imparsonce; and that parcel of the grounds in the tenure of the said abbot were used for pasture, and kept in the abbot's hands; and before the dissolution of the said monastery, there was paid in money unto the said late abbot there for tithes of household by nine several tenants of parcel of the premises, every one of them 5 d. each yearly; and that the said late abbot and convent in 28 H. 8. by writing indented under their convent seal, did demise and let to one *Janet Richardson* the tithe-corn, hemp, and lyne renewing within one tenement, parcel of *Pillin* aforesaid, for divers years, paying yearly for the same 2 s.; and the same so continued until and at the dissolution of the said late monastery: by reason of which dissolution of the said monastery, as well the said parsonage as the said messuages, lands, tenements, and hereditaments, came into the hands of the said late king H. 8. who, by letters patent about the 36th year of his reign, assured and conveyed the said messuages, lands, and tenements, called, *Pillin*, unto *John Kychin* and his heirs, under whose titles the defendants claim; and afterwards the said late king demised the said rectory and parsonage of *Garflang* in 36th of his reign, unto *John Burnell* for years yet enduring, who assigned his interest unto the said *John Kychin*; and that he so possessed did demise the said rectory (except the tithes in certain towns whereof *Pillin* was none) to *John Rigmayder* for divers years now being expired; and after he being so possessed, made executrix the said plaintiff *Jane Kychin* his wife, and died thereof possessed as aforesaid; and after the dissolution of the monastery, such parcel of the said premises as before was in demayne, were converted into tillage; and the tenants and occupiers thereof, by the space of 28 years or thereabouts, did set out the tithes of corn and grain growing in the same grounds, and severed the same from the nine parts as a tithe in proper kind, and paid all other small tithes of and for the same: albeit the said *John Rigmayder*, for that he did think the said tithes had been excepted in his lease, did not, during the continuance of his lease, receive or take the same tithes, but the said *John Kychin*, after the same grant unto *John Rigmayder* during his life, and thence his decease, the said

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Jane Kychin and *Robert Dalton* esq. to whom she did let the same tithes, have, as well during the continuance of the said *Rigmayder's* lease as sithence the end thereof, received and taken the said tithes of corn and grain, and all other small tithes of and for the same, until within these three years now last past. And whether hereupon the defendants, and the other occupiers of the said grounds in *Pillin*, ought in right to pay tithes unto the plaintiff, or were discharged thereof, was the question: and upon report of the Barons for their opinions in law upon the said case and matter of the said tithes of the said lands in *Pillin* in controversy between the said parties, and upon hearing of depositions of witnesses and counsel learned on both sides, it is ordered and decreed this present 10th day of *May*, in the 24th year of the reign of our sovereign lady queen *Elizabeth*, by the right honourable Sir *William Cecil* knight, Lord *Burghly* lord treasurer of *England*, Sir *Walter Mildmay*, knight, chancellor and under-treasurer of the Exchequer, Sir *Roger Manwood*, knight, lord chief baron there, and by the rest of the barons of the same court, that the plaintiff, and such as shall be the queen's majesty's farmers of the rectory of *Garstang* for the time being, shall have and enjoy all kind of tithes yearly coming and renewing upon and of all the said lands in *Pillin* in their proper nature and kind for ever and henceforth: provided nevertheless if good proof in this court before the feast of *All Saints* next coming, by sufficient leases in writing made by the said *John Kychin* or *Robert Dalton* esq. deceased, owners of the said lands in *Pillin*, shall be made, that such corn and other things as the plaintiff's witnesses have deposed to have been paid by the space of 27 years or more, since the dissolution of the monastery of *Cokerfand*, as tithes were paid by special reservation or covenants in the same leases as rent-corn, and not as tithes, then this order and decree for payment to cease and from thenceforth not to be executed, or else to stand in full force, strength, and virtue: and concerning the arrearages of tithes past, for which bond hath been made to the plaintiff, for that it was by both parties confessed, the said *Robert Dalton* hath had answered unto him 30*l.* yearly in one gross rent by the space of divers years together, for such tithes in *Pillin* as were not otherwise letten by lease, and for that the said defendants and inhabitants which did contribute and pay the said 30*l.* have, by the space of three years last, occupied the said lands and tithes in *Pillin*, for the tithes whereof the said 30*l.* yearly was paid, without yielding any tithes or any recompence for the same;

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same; it is ordered and decreed, that the said defendants and inhabitants which did contribute and pay the said 30 l. yearly, shall, in like sort, contribute and pay unto the said complainant for the tithes by them substracted by the space of the said three years after the said rate of 30 l. yearly, the sum of 90 l. before the beginning of the next *Michaelmas* term. And for the more quiet and indifferent levying of the said money for the same arrearages of tithes for the three years past, it is ordered and decreed, that not only the tenants named defendants in this suit, but also the said other inhabitants and tenants of those lands in *Pillin* aforelaid, which were contributory to the said 30 l. yearly for tithes, or paid tithes in kind to the said *Robert Dalton* deceased, or his assigns, shall be equally contributory and charged in this payment, according to the yearly value of their lands and tenements by them or their assigns holden and occupied as the same now are worth to be letten; and that such of the said contributory tenants as within the said three years held or now hold tithe by lease in writing from the said *John Kydin* deceased, shall, for the time of their so holding, be in their payment deducted and allowed, in such form and after such rate as they have before deducted and allowed for the same tithe, according to the tenor of their leases: provided also, that if the said defendants shall, in form aforementioned, prove the said tithes to have been paid as rent-corn specially reserved or covenanted, and not as tithes, that then the said 90 l. being in the meantime, according to the decree, paid and delivered to the said plaintiff for arrearages of tithes in manner and form, and for the time before expressed, shall be repaid by the said plaintiff to such persons as have paid the same by the tenor of this order and decree to the plaintiff, this order and decree notwithstanding. And in default of such proof, then this present decree and order for due payment of tithes shall remain and continue in full force, power, and effect, to all purposes.

[This cause came on again on 20th of November following, when it was decreed, that]

For the tithes of the last summer, and so from thenceforth, the same are to be paid and continued to the queen's majesty, her farmers and assigns; for that the late leases or other matters shewed not sufficient to impugn the depositions of witnesses which have proved the quiet continuance of payment of tithes by the space of 17 or 28 years sithence the dissolution of the monasteries; and for direction

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direction of the tenants of *Pillin*, to be rateably and proportionably contributory for satisfaction of the 90 l. for the three former years, according to the decree, it is further ordered, that *Brynn Parker* and *Rd. Bolde* esquires, persons indifferently named by the court, shall, by their directions, rate every tenant and tement, and shall examine the circumstances in whose hands the same duties for tithes doth remain, and what part thereof is to be deducted or defalked by reason of any lease or occupation of the said *Jane Kychin*, or other just cause; and that so much of the said 90 l. as shall appear to be due to the said *Jane Kychin*, shall be collected by those tenants which were parties defendants named in the suit and decree; and the one moiety of the same duty to be paid to the said *Jane Kychin* before the 12th day of *January* next, and the other moiety before the 20th day of *May* next: and if any of the said tenants shall not agree to pay their money by the said two chosen persons rated and apportioned, it is ordered, that the said two chosen persons shall cause such refusers to be bound to appear in this court before the second return of next *Hilary* term, there to answer their contempt: and if the said two chosen persons shall not accord in rating and ordering of the premises, then they jointly or severally to certify this court in writing before the said second return, how far they did agree, and wherein they did differ; and certify their joint or several opinions, and the circumstances which they shall find touching the premises to this court in writing; and thereupon this court is to proceed to a final end for the payment of the said arrearages.

* Mich^s 31^o Ch. II. A. D. Scac.

Bradshaw v. Clifton. [MS.]

JANE Bradshaw widow, administratrix of *Ambrose Bradshaw* and of *John Bradshaw*, brought her bill against *James Clifton* and others, for tithes in *Forton*, in *Com. Lanc.*

The defendants, by answer, alleged, that anciently, long before the dissolution of religious houses, the abbot and convent of *Cokersand*, or the abbot of *Furnes*, or some other religious house or order, (which defendants on proof should be ready to ascertain), was seised in fee in right of the said abbey or other religious house or order, of the manor and lands in *Forton*; which abbey, or other religious

religious house or order, was of the *Præmonstratenses* order, of some other order exempt or freed from tithes; and, among other privileges and exemptions, the said abbot of *Cokerland*, or other abbey having and claiming the said manor and lands in *Forton*, either by order, privilege, bull, grant, prescription, or other good ways warrantable in those times, held the said manor and lands of *Forton* discharged of tithes *dum propriis manibus excolebantur*, and so time out of mind, until and at the surrender thereof; by virtue whereof, and of statute 31 *H. 8.* and of 32 *H. 8.* they claimed to hold the said lands discharged of tithes. That king *H. 8.* being seised of the manor of *Forton* discharged of tithes, granted the same 1st *August* anno 35 to *Thomas Holt* in fee; and by virtue thereof, and of the statutes aforesaid, he the said *Thomas Holt* ought to have held and enjoyed the same (had he held the same in his own hands, and not let it out to farmers or tenants) freed and discharged from any tithes whatever; though in truth, the defendants believed that, at the surrender, the said manor was in lease to *John Kychin* a farmer, and not in the houses own occupation; that the said patentee *Mr. Holt*, nor his heirs, inheritors of the said manor, ever held the same in their own hands, but leased out the same to tenants from time to time, which was the reason the said tenants, during their occupation, paid tithes *pro tempore*; but the inheritors themselves, when they held the lands in their own occupation, ought, and were acquitted. That in *Feb. 18 Ch. 2.* the heir of the said *Holt* conveyed to defendants *Richard Newsham*, *John Carlos*, *James Clifton*, and *John Fox*, in fee, the said manor and lands of *Forton*, whereof all the defendants have severally set forth themselves to be respectively seised as aforesaid to them and their heirs for ever; by virtue whereof the said defendants ought to hold and enjoy the said lands free of tithes, in as large and ample a manner as the said abbots or other religious houses held the same; that the said defendants, *Newsham*, *Carlos*, *Clifton*, and *Fox*, did afterwards convey to the other defendants in fee, the several lands whereof they, by their answers, stated themselves to be owners and inheritors, by virtue whereof the said several defendants had been, during the time in the bill, the inheritors and occupiers of the said respective lands, holding them in their own hands, and not letting them to farm or demise, other than as aforesaid; and therefore they insisted on being discharged of tithes. That this cause came on to be heard the 27th of *June* anno 30 *Ch. 2.* when, after full and large debate, the court decreed all the defendants to pay the values of their tithes to the

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plaintiff: but, on the defendants petition, the court ordered the cause to be reheard. And now it was reheard accordingly, when, upon long debate, the defendants counsel insisting that the said lands being parcel of the possessions of the abbey of *Cokerland*, ought to be discharged of tithes; for that the lands held of the said abbey were, at the dissolution, by prescription, freed and discharged of tithes *dum propriis manibus excolebantur*; and further, insisting upon the several exemptions and privileges in the answer mentioned: in regard nothing appeared, or was made out on the proofs in this cause, to give or grant any privilege, exemption, or discharge to the defendants, for non-payment of tithes of the lands in their answers mentioned *dum propriis manibus excolebantur*, the court did think fit to decree the payment thereof to the plaintiff: It is thereupon ordered and decreed by the court, that the several defendants do forthwith satisfy and pay to the plaintiff the value of the said tithes, as set forth in their answers, the plaintiff agreeing to accept the same at that value.

* Mich' 10 Geo. I. A. D. 1723.

Lambert v. Cummin. [MS.]

JOSIAH LAMBERT gent. lessee of the dean and chapter of *Worcester*, brought his bill against *Edward Cummin* and others, for tithes in *Warton in Lancashire*. The defendant *Cummin*, by his answer, alleged, that king *H. 8.* on 23 *March anno 36*, granted the lands in the answer mentioned to *John Bradyll* in fee, under whom the defendants claimed. He said, that no impropriator or lessee thereof ever took or received any tithe in kind, or any thing in lieu thereof on the said lands. He insisted, that the said lands were parcel of the dissolved abbey of *Cokerland*, which was one of the greater abbeys, and came to the crown by statute 31 *H. 8.* and were held and enjoyed always, and at the time of the dissolution, by the said abbot and convent, discharged of tithes; and had been so enjoyed ever since the dissolution; that the plaintiff, or any former lessee, never demanded tithes of the said estate, and he was advised such exemption was not lost by the dissolution of the abbey, but the privilege continued by virtue of the said statute; and that he, as owner and occupier, ought to have the advantage of such discharge; that he and his predecessors had enjoyed the said estate above 100 years free of tithes.

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Now, on hearing, upon reading the surrender of the said abbey in the year of H. 8. and the letters patent to *John Braddylh*, and the minister's accounts of 35 H. 8. whereby it appears that the said abbey of *Cokerland* was one of the greater abbeys; the court declared the said estate to be discharged of tithes, and dismissed the bill with costs.

N. B. This was a decree made by the three barons, *Price*, *Page*, and *Gilbert*.

P. 11 Geo. III. A. D. 1771. Scac.

Townley v. Tomlinson. [3 Wood's Decr. 336.]

THIS was a bill filed by the impropriatrix to obtain the effect of her former suit, the defendants, notwithstanding the decree in that suit, still persisting to with-hold their tithes.

The defendants by their answer stated, that the lands occupied by them in *Pilling* were of three different tenures, viz. that one undivided third part of such lands was holden under leases for lives at small reserved rents; that one other undivided third part thereof was holden under leases for a certain number of years at rack rents; and that the remaining third part thereof was holden by *R. Hesketb* under leases for lives until the year 1747; that *R. Hesketb* then conveyed the inheritance of his third part of and in the lands so by him occupied to them; that they had ever since holden and occupied the same; and that being thus owners of the inheritance of such third part, and also occupiers of the whole, they were entitled to an exemption from payment of tithes in respect of the said third part, by reason that the same was heretofore parcel of lands belonging to an abbey of a privileged order before and at the time of the dissolution of monasteries, as after mentioned: that they disclaimed all right to tithes of the other two third parts, as being only lessees or farmers thereof, so that the chief point in controversy by this suit as between the plaintiff and defendants was, whether such third part was exempt from tithes when occupied by the owners of the inheritance thereof, or not.

Lands formerly parcel of the possessions of a greater abbey of the Præmonstratensian order, are not therefore exempted from the payment of tithes when in the manurance of the owners of the inheritance.

The defendants therefore, with respect to such exemption and discharge, further said, that as well the lands in question as the tithes thereof had been formerly part of the possessions of the abbey of *Cokerland* in the said county; that the said abbey was of a very ancient foundation, and of the order of the *Præmonstratenses*; that

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that the religious houses of that order, by virtue of some ancient bulls of exemption; had immemorially holden their lands freed and discharged from the payment of all tithes whatever, or any modus or composition in lieu thereof, when such lands were in the immediate manurance, culture, and occupation of the abbot and convent, as owners of the inheritance thereof, and not let to farmers or tenants; and they insisted, that for time immemorial, and until and at the time of the surrender and dissolution of the said abbey, the tithes of *Pilling* belonged to and were the inheritance and part of the possessions of the abbot and convent of the said abbey; that the lands in *Pilling*, whereof the tithes were demanded by the bill, had also been for time immemorial, and until and at the time of the said surrender and dissolution, in the actual hands, culture, and occupation of the said abbot and convent for the time being; and that as such, and by virtue of the exemption before mentioned, they were discharged from the payment of any tithes to themselves or any other person whatever; and that the lands had been immemorially, and still ought to be so exempt and discharged when occupied by the owners of the inheritance thereof, and not let to tenants or farmers, not only during and in case of unity of right and possession to such tithes and lands, but also when such right and possession were severed, and to whomsoever the same respectively belonged: that this was the plain uncomplicated exemption and discharge now claimed and insisted on by the defendants for and in respect of the third part of their said lands; and they further said, that during such unity of right and possession by the said abbot and convent it was needless, and that afterwards, during the occupation of the said lands by lessees or farmers, it would have been unavailing, to insist on the said exemption; and they admitted, that, being but modern purchasers, they had misconceived, and not sufficiently made out their defence in the former suit. But they further said, that there were divers records and testimonies to manifest such exemption, and particularly that it appeared by a grant made in the second year of king *John*, that he granted to the canons of *Cokerfund* for ever the whole pasture of *Pilling*, to hold in free, pure, and perpetual alms, with all its easements; that afterwards, by a surrender of *Robert*, then abbot of the said abbey and of the convent of *Cokerfund*, executed under their conventual seal in the 30th year of *Henry* the eighth, the said abbey, with all its manors, lands, tithes, and other possessions, were surrendered to the said king, to hold to him and his heirs for ever,

whereby,

whereby, and by virtue of the statute 31 H. 8. entitled, " An act for the dissolution of monasteries and abbeys," the said abbey with all its possessions (whereof the lands of which tithes were now demanded were part) became vested in the said king, his heirs and successors, freed and discharged from the payment of tithes in the same manner as they were holden by the said abbey; that his said majesty being so seised did, by his letters patent dated the 1st of September in the 35th year of his reign, for the consideration therein mentioned, grant to J. Kychin and his heirs the site of the said abbey of *Cokerfand*, with the appurtenances, and several other parcels of land in the answer mentioned; and also all that the grange or pasture of *Pilling*, containing 1000 acres, and all the lands known by the name of the *Demefne Lands* of the said abbey, to hold the same in as full and ample a manner as any of the abbots had holden the same at or before the dissolution thereof; and they insisted, that by virtue of such grant, and of the grant by king *Jshn*, and of the said surrender and act of parliament, the said J. Kychin, and all persons claiming under him, and the lands so granted to him as aforesaid, (of which the lands whereof the tithes now in dispute were part), were entitled to the said exemption and discharge from the payment of all tithes, offerings, and ecclesiastical dues whatsoever, when in the hands and occupation of the owners of the inheritance thereof, in as ample a manner as the said abbot and convent before their surrender and dissolution, or as the said king *Henry* the eighth after such dissolution whilst the same continued in his hands, were or was entitled thereto, such exemption being a privilege which attached, immediately on being granted, upon the inheritance of the lands themselves. And they further insisted, that although, by reason of the said unity of possession, and by the said lands being afterwards leased out to farmers, there might have been no opportunity of claiming the actual enjoyment of the said exemption for ever so long a time, yet that when the said unity of possession became severed, and the said leases expired, the said exemption would and did come in play and force again, as before insisted upon. They further said, that all the lands therein descended from the said J. Kychin to three of his daughters, who married, and held their three parts of the said lands in common undivided, and from time to time demised the same upon leases to tenants until the year 1747, when *R. Hesketh* (whose ancestor married one of the three daughters) began to sell off his undivided third part into freehold or lands of inheritance; that the third daughter

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daughter of the said *Kychin* had married one *Tichborne* or *Werden*; that her third part or share of her father's lands was divided from the other two parts into severalty, and was still holden in severalty by sundry persons to whom the same had, from time to time, been sold off; that such lands were known and distinguished from the other lands in *Pilling* by the name of *Tichborne* and *Werden's Lands*, and were in the actual possession or enjoyment of the said exemption and discharge, now insisted on by the defendants, when such lands were in the hands and occupation of the owners of the inheritance thereof. The defendants further said, that there were divers other lands, (besides those last-mentioned, and those of which the tithes were now in dispute), which were formerly, and before the dissolution of monasteries, belonging to the abbey of *Cokerland*, and also to other religious houses within this kingdom, which were of the said *Præmonstratensian* order, and which immemorially were, and still are, holden, exempt, and discharged from the payment of tithes whilst in the hands, culture, and occupation of the owners of inheritance thereof, particularly in *Warton*, *Ellell*, *Middleton*, and in divers other parishes and places, which they hoped would be evidence beyond a doubt, not only of the justice and legality of the exemption and discharge now claimed by them, but also that such ancient bull or bulls of exemption before mentioned to be granted in favour of the said religious order of the *Præmonstratenses*, and which were the ground and foundation of such exemption, did obtain here, and were actually received and sufficiently put in use within this kingdom, so as to avoid the force and power of the statute 7 H. 4. concerning such bulls and all other acts of parliament relative thereto. They then, as to personal and small tithes, set up several moduses, which they insisted upon. They further said, that if neither they nor the other owners and occupiers of lands in *Pilling* heretofore belonging to and part of the possessions of the said dissolved abbey of *Cokerland*, had ever pretended to claim any other or greater exemption than that which was now insisted on, such exemption would never have been disputed or denied by the plaintiff or her predecessors, or any other person claiming tithes in *Pilling*. But they admitted, that having mistaken their said privilege and partial exemption, and instead thereof pretended sometimes to a total or general one, by reason of those lands having been heretofore parcel of the possessions and inheritance of a greater monastery, there was such a suit heretofore brought by the plaintiff against them and others; and that, they
being

being but modern purchasers, and sometimes apprehending themselves entitled to and insisting upon a general exemption, and at other times a partial exemption, and thereby neglecting properly to state the time, nature, and ground of the said partial exemption now insisted upon, and to apply their defence and proofs in support of such partial and true exemption, the court did, in such former suit, decree tithes in general to be accounted for and paid by the defendants, (except as to milk, calves, and garden stuff); but they insisted, that such a decree would not have been made in case they, in the said suit, had never claimed more than the said partial exemption, and had not set up other misconceived and inconsistent defences, and mistakenly applied the weight of their proofs, in disputing the rights of the parish of *Garstang* and matters not applicable to the true question, and neglected to prove to the court, that not only the owners of the inheritance of lands within *Pilling* aforesaid, but also the owners of lands in other places which formerly belonged to the said dissolved abbey of *Cokerfund* and to other monasteries within this kingdom of the said order of *Præmonstratenses*, were, and immemorially had been, in the actual possession and enjoyment of the said exemption from paying tithes of such or so much of such lands as were, or from time to time heretofore had been, in their own manurance, culture, and occupation: wherefore they hoped, that they should not be bound or precluded further by the said decree than as to such tithes as were decreed to be accounted for and paid to the plaintiff down to the time of the making thereof; and said, that if the said suit had been properly managed, they had not only been saved the grievous expence thereof, but also the trouble of this suit, and had been left in the quiet possession and enjoyment of the said ancient and immemorial privilege and exemption by them in their answer insisted upon as belonging to the lands of which they had respectively purchased third parts as aforesaid.

There was a replication and rejoinder; and an examination of witnesses; and a great body of written evidence was read, much larger, and some of it of far earlier date than that which was exhibited in the former cause. However, the court, which was full, disallowed the exemption set up by the defendants from the payment of tithes of the lands in *Pilling*, as owners of the inheritance thereof; and decreed an account.

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Tr. 11 Geo. III. A. D. 1771. Scac.

Hicks v. Trieſe. [3 Wood's Decr. 363.]

▲ mill, formerly a tucking-mill, but afterwards used merely for the purpose of grinding oats for the owner's hounds, is not tithable.

THE plaintiff in this case claimed (*inter al.*) the tithes of two mills: but, it appearing to the court by the proofs taken in the cause, that the one mill had been an ancient mill existing from beyond time of memory, and, consequently, that no tithes were due to the plaintiff for the same; and that the other mill formerly a *tucking-mill*, and converted by the defendant into a mill for grinding corn, had been used by the defendant for grinding oats for his hounds, and for no other purpose whatever; and that, therefore, no profit had been received by him for such grinding, and, of consequence, that no tithes were due to the plaintiff for the same; the bill was dismissed as to these tithes with costs.

H. 12 Geo. III. A. D. 1772. Scac.

Ellis v. Fermor. [MS.]

Where sheep are agisted part of the year on a common in one parish appurtenant to a farm in another parish, an agistment-tithe, it seems, is not due to the parson of the former parish, although the sheep are all shorn in, and the tithe of wool wholly paid to the parson of, the latter.

THE vicar of *Stoke Lyne* in the county of *Oxford* claimed all vicarial tithes in the parish, and, in particular, the tithes of agistment for all sheep agisted therein, and not shorn therein, or of which no tithe-wool was paid to him; and the tithe of all furze cut thereon, or sold and carried away, or expended in the parish; and stated, that the defendant *Fermor* had, since his, the plaintiff's, induction to the said vicarage on the 21st of *October* 1756, been seised in fee, or some other estate of inheritance, of two farms called *Tusmores*, situated in the parish of *Tusmore*, by reason whereof he and his tenants and lessees, occupiers of the said farms, had a right to depasture 240 sheep for each of those farms upon a common called, *Bayard's Green*, in the parish of *Stoke Lyne*; that the defendant had himself occupied one of the said farms called *Tusmore Farm*, from the said time until the 5th of *April* 1766; that he then let the same to the defendant *Roberts*, who had ever since occupied it; that the defendant *Allen* had, from the said 21st of *October* 1756, occupied the other farm; that they had, for great part of the time, agisted each 240 sheep on *Bayard's Green*, but had always shorn such sheep out of the parish of *Stoke Lyne*, and had not paid the plaintiff any tithes for the wool of such sheep; and the plaintiff insisted,

insisted, that he was entitled to receive agistment tithe for the said sheep in proportion to the value of the pasturage thereof for the time they were respectively depastured in the parish of *Stoke Lyne*. The bill further stated, that the defendant *Fermor* had also occupied a large quantity of furze grounds within *Stoke Lyne*, and had annually cut and sold or carried away out of the said parish large quantities of furze, the tithes for which he ought to have paid to the plaintiff.

The defendant *Fermor* said, that the plaintiff was vicar, and, as such, entitled to all vicarial tithes, except as after mentioned; that he had, during all the time the plaintiff had been vicar, been seised in fee of two farms, the one called, *Tusmore*, and the other, *Pimlico*, in the liberty of *Tusmore* in the parish of *Tusmore*; that the respective occupiers of the said farms had a right to depasture each of them 240 sheep upon *Bayard's Green*; that the said right had been immemorially exercised by the occupiers thereof; that he had occupied *Tusmore Farm* from the time of the plaintiff's induction until the 5th of *April* 1766; and that from that time the defendant *Roberts* had occupied the same as tenant to him; that during the time he occupied the said farm, he had depastured yearly on *Bayard's Green* 240 sheep from the latter end of *April* to the latter end of *October*; but that none of the said sheep had ever lodged on *Bayard's Green*, or within the parish of *Stoke Lyne*, but were driven off from *Bayard's Green* every evening, and lodged and folded within some part of *Tusmore Farm*; that the defendant *Allen* had, ever since the plaintiff's induction, occupied *Pimlico Farm* as his tenant; that during the respective times that the defendants *Roberts* and *Allen* had occupied the said farms, they had respectively depastured on *Bayard's Green* yearly, from about the latter end of *April* until about the latter end of *October*, 240 sheep in respect of each of the said farms, but that none of their said sheep had lodged by night thereon, or within the parish of *Stoke Lyne*, but had every evening been lodged or folded within the said farms. He admitted, that he had shorn all such sheep depastured on *Bayard's Green* out of the parish of *Stoke Lyne*, and had shorn the same in the parish of *Tusmore*, and had never paid the plaintiff the tithe of wool or any other tithe in respect of such sheep; but he said, that he had paid to the rector of *Tusmore* the tithe of such wool, or made him a satisfaction for the same. He further said, that he did not believe that the plaintiff was entitled to agistment tithes for the pasturage of the said sheep, because that the sheep-gates for 480 sheep appurtenant

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to the said tenements had been immemorially used and enjoyed by the occupiers of *Tusmore Farm* and *Pimlico Farm* upon *Bayard's Green* in the parish of *Stoke Lyne*; and that the tithes of wool of the said sheep had been immemorially paid and payable, and of right ought to be paid and payable to the rector of *Tusmore* for the time being, as often as the said sheep had been shorn in the said parish of *Tusmore*; and that it had been the constant usage to shear such sheep in the parish of *Tusmore*; that defendant had accordingly paid such tithe or other satisfaction to the rector of *Tusmore* for all such sheep as the defendant, and also the defendants *Roberts* and *Allen* had respectively agisted on *Bayard's Green* from the time of the plaintiff's induction to the vicarage of *Stoke Lyne*; that the plaintiff therefore was not entitled to the tithe of agistment which he claimed, the sheep not having been fraudulently removed to *Tusmore* to be shorn there. He admitted also, that he occupied 20 acres of furze lands on *Bayard's Green*; but said, that he did not know whether the same were in the parish of *Stoke Lyne*; that he had one year with another cut 5000 furze; but he denied, that he had sold any part of the furze; but said, that he had expended some part thereof in fuel and husbandry on the said farms, and had used the remaining part at his brick kilns to burn bricks for the necessary repairs of his estate: and he insisted, that he was not liable to pay any tithe for such furze, even if it had grown upon any land within the parish of *Stoke Lyne*, which he did not admit; and he added, that the said furze might be worth on the spot where cut about 12s. a hundred.

The answer was followed by a replication and rejoinder; and witnesses were examined for both parties.

The court being divided, the judges delivered their opinions *seriatim*.

Perrott B.—It appears in this case that the demand of agistment tithes was made in 1768 for the first time. I think that the court ought not to support such a demand. Tithes ought to be paid as they used to be paid: it is so directed by the several acts of *H. 8.* and *E. 6.* But, if these acts were out of the case, I think we ought to suppose that there was a legal exclusion of this demand. I will suppose that the owner of both farms had before the division of parishes in this kingdom dedicated the tithes of this ground to *Tusmore*; to the parson of which parish it appears that the tithe of wool has always been paid. *Crispe v. Mickleburgh*, (*supra* 604.) which has been cited, is an authority in point. That decree was

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reversed because the plaintiff had never received the tithes, but they had always been paid to the parson of the parish where the occupier resided. The statute of 2 & 3 E. 6. relating to the tithes of land where the parishes are not known, provides, that where tithe has been paid to the parson of any particular parish, the statute shall not have effect. And so is *Sav. 60.* where it is stated, that "there was a fen called, *Wildmore*, in the county of *Lincoln*, which was not known to lie in any parish certain. Upon which it was ordered in this court, that the tithes in that case should be paid to the parson, vicar, pensionary, &c. where the owner of the cattle inhabited. But, if the tithes have been paid to the parson of any parish time out of mind, &c. ; although it is not known in what parish the moor or common is, they shall continue to be paid in the parish where they have been used to be paid. But, where no use of payment hath been as before, nor the parish certainly known, they shall be paid to the parson or vicar where the owner resides, by a proviso in the statute of 2 & 3 E. 6. c. 13."

I think that the bill ought to be dismissed, as to the agistment tithe.

Adams B.—As the rule is now settled, that tithe of wool may be paid in one parish, and tithe of agistment in another, we cannot in this case depart from it. The defendant insists, that the tithe of wool has been paid to the parson of *Tusmore* as often as the sheep have been shorn in that parish; and, therefore, that no agistment tithe is due in the parish of *Stoke Lyne*. But this conclusion is without ground; for wool, as I said before, may be paid in one parish, and agistment in another. The defendant does not state, that the sheep were levant and couchant on the farm in *Tusmore*, nor that he dwells in *Tusmore*. But take it to be so, and that this common is appurtenant to the farm which has paid tithe of wool; yet, if the common is in another parish, it must pay an agistment-tithe there. There may be cases where the principal land or farm being discharged, the accessory or common shall be so. In the case of taxes* (which has been cited at the bar) the court held that the parish in which the land lay should have the benefit; for every commoner ought to be assessed severally, it being a charge on the person in right of the land, and therefore he should be taxed where the land lay and not where he resided. Suppose lambs had fallen in the common, the parson of *Tusmore* would not have been entitled to them. Tithe is not a charge out of land, nor a personal charge; but

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but an ecclesiastical inheritance due to the parson, and arising within the parish. The case of *Crispe* and *Mickleburgh* does not seem to me to be in point. It was not a right of common in the parson of the parish who claimed the tithe, but it was a common *pur cause de vicinage*. If the reason for reversing that decree was what is mentioned by my brother *Perrott*, it would have amounted to a prescription *in non decimando*.

Smythe B.—I think that the parson is not entitled to an agistment-tithe. If the old rule could hold with convenience, it would be the best method: for, as it is now, the occupier is sometimes liable to pay double tithe. The only excuse for it is, that it is his own fault to move them. But I think that this rule ought not to hold, where a farm is in one parish, and an incorporeal right annexed to it, as a common, is in another parish: the common should be considered as part of the farm in the other parish. The case of exemption in *Bunb.* 138. (*supra* 647.) is to this effect. The case of rating is so; and the same rule may apply to tithing. And the usage in the present case having gone accordingly, we ought not to disturb it.

Parker C. B. after stating the pleading, said, “I will consider this case first as to the agistment-tithe. And upon that I am of the same opinion with my brothers *Smythe* and *Perrott*, but I confine myself to, and ground my opinion upon this particular case. Suppose a man holds a farm and lives in the parish of *A.* and holds other lands quite distinct from his farm, and no way exempted, in the parish of *B.* and depastures his sheep upon the lands in that parish, but shears them in *A.* the parson of *B.* shall have an agistment-tithe, because he has no other profit of those sheep. The statute of 2 & 3 E. 6. c. 13. § 3. by providing, that where persons have beasts or other tithable cattle fed in any waste or common grounds whereof the parish is not certainly known (*q*), shall pay their tithe of such cattle to the parson, vicar, &c. where the owner of the cattle lives, implies, that where it is known in what parish such a common lies, tithes are due to the rector or vicar of that parish for the cattle feeding therein. And the determination of the House of

(q) In the *Reformatio legum*, tit. *De decimis*, c. 4. p. 117, 118. *Cum autem communia duabus aut pluribus parochiis pascua sunt, in quibus sparsim animalia degunt; aut si terræ vastæ sint, et publicum usum habentes, quas nostro sermone dicimus, waste grounds, in quibus nullum sit proprietatis jus ullius certæ parochiæ; aut quando talis est vicinarum parochiarum inter se pascuorum communicatio, mutuis ut vicibus in illis pascuorum jus obambulet, certis anni temporibus humano quodam et commodo sicut propinquitatis respectu; tum segregetur ad illum locum decimarum jus in quo possessor animalium inhabitat.*

Lords in *Crispe v. Mickleburgh* proceeded upon that supposition: for the reason of dismissing the bill was, because the owners of the cattle feeding on the common had always paid their tithes to the ministers of the parishes where they lived.

It is clear, that before the council of *Lateran*, the laity might give their tithe to what church they pleased; and the parson of *Tusmore* might have the tithe of *Bayard's Green* as a portion of tithes, 2 *Inst.* 641. But then it should have been laid that the tithe of this common belonged to him by grant or prescription, *Godb.* 45. But, though the defendant has not done that, yet he has prescribed for common for a certain number of sheep upon *Bayard's Green* in the parish of *Stoke Lyne* as appurtenant to *Tusmore* and *Pimlico* farms in the parish of *Tusmore*, and that tithe-wool or other satisfaction hath been immemorially paid to the rector of *Tusmore* as often as the sheep were shorn in that parish; and that it has been the constant usage to shear them there, and that agistment-tithe is not due to the plaintiff, as the sheep were shorn in the parish of *Tusmore*, and not fraudulently removed. And I am of opinion, that this is a good defence against the present demand, and I rely on the case of the *King, William Blunsham, and others, v. Henry Fox, Hil. 4 Ann. B. R. Rol. 78. in error.* It was error in a judgement in *C. B.* where, upon a special verdict it appeared, that several persons had been assessed to the land-tax in the parishes where their commons lay, and the assessments, confirmed by the courts. And the court of Common Pleas gave judgement for the defendants, because they acted under the warrants of the courts who had jurisdiction. But, upon a writ of error, the court of Queen's Bench reversed the judgement, and resolved, that these commons appendant ought to be assessed to the land-tax in the parishes where the farms, to which they are appendant, lie; but that the farms, to which they belong, ought to be assessed the higher in regard to these profits belonging to them, for that they are parts of those farms, and pass incidently with them. Otherwise, of commons in gross. And they also held, that the defendants being the assessors, and making the assessments, and procuring a confirmation of them, and the warrants of distress, should not be allowed to justify under those warrants; and the judgement was reversed.

But it was objected by the plaintiff's counsel that the defendant hath failed in proving his case: but I think that the proof he has brought is sufficient. He has read in evidence a grant of 10 *Apr. 23 Eliz.* by which "Thomas Pigott grants to Edward Love a mes-

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“ suage or farm, and toft, in *Fencot* in the parish of *Stoke Lyne*,
 “ and four yards of land; excepted to the said *Thomas Pigott*, all
 “ that sheep gate of 400 sheep, and his right and title of feeding
 “ and depasturing the said sheep in the fields in *Fencot* in the
 “ parishes of *Stoke Lyne* and *Tusmore*, in and upon one great piece
 “ or parcel of ground, common, or waste, usually called by the
 “ name of *Bayard’s Green*, adjoining to the manor of *Tusmore*,
 “ other than all such common and sheep-gates as of right belonging
 “ and appertaining to the said messuage or farm and toft lands and
 “ tenements then or late in the tenure of *Giles Marsh*; the said
 “ *T. Pigott* his heirs and assigns the said common and sheep-gates
 “ to have and enjoy in such manner as the said *Thomas* and his
 “ ancestors, whose estates he has in the manor of *Tusmore*, which
 “ he has enjoyed in right of the manor in or upon *Bayard’s Green*,
 “ by reason of the manor of *Tusmore*; the tithe of wool and
 “ all other tithe of the which said sheep is and hath been usually
 “ belonging to the rectory of *Tusmore* aforesaid.” *Richard Bonner*
 proves the enjoyment of this common, and that they folded in
Tusmore, and never knew any tithe-wool paid. The old receipts
 prove 59s. paid annually as a pension by Sir *Richard Fermor*, an
 ancestor of the defendant, to the rector of *Tusmore*: these receipts
 are in 1611, 1612, 1629, 1630, 1634, 1636. Mr. *Gamble*, the
 steward, proves 15l. yearly paid by *William Fermor* to the rector of
Tusmore by half-yearly payments for several years in lieu of all
 tithes. So that the proof seems to me to be complete.

As to the tithe of furze, the defendant admits, that ever since the
 plaintiff was vicar of *Stoke Lyne*, he hath occupied 20 acres of furze
 land on *Bayard’s Green*, but knows not whether all or any part of
 such land is in the parish of *Stoke Lyne*; that he has yearly cut
 about 5000 furze from off the land, but does not know that any
 was sold, but that it was employed on husbandry occasions on *Tus-*
more or *Pimlico* farms, or expended in repairs upon them.

Though it is not admitted by the answer, yet it is proved by
 two witnesses, that the furze land lies in the parish of *Stoke Lyne*.
 The defendant does not prescribe for estovers as appurtenant to
 either of his farms in the parish of *Tusmore*, or shew in what right
 he occupied the furze ground in *Stoke Lyne*. Tithes of furze are
 due of common right, *Wolferstan v. Bragington*, setting down of
causes after Tr. 1746; and furze cut in one parish cannot be ex-
 empted from tithe by being employed in husbandry purposes in an-

other parish, according to the reasoning in *Holbeach v. Whadcock*, *Hardr.* 184. and *Scoles v. Lowther*, 1 *Lord Raym.* 129.

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The other three Barons concurred in opinion with the Chief Baron with respect to the tithe of furze.

The bill therefore was dismissed as to the agistment-tithe by the opinion of three Barons, *diffident Adams B.* but the defendant was decreed to account for the tithe of furze without costs on either side to this time, reserving subsequent costs till the coming in of the report (r).

(r) When this cause was opened, the Chief Baron, Smythe and Adams B. expressed themselves strongly of opinion that the vicar was entitled to the agistment-tithe of the sheep, and desired to hear what defence could be made. The defendant's counsel said but little, but cited the case of *Poor v. Seymour*, (*supra* 713.) which the court denied to be law. The three Barons thereupon persisted in their opinion, and in support of it the plaintiff's counsel cited *Lane 16. Bro. Dixmes*, pl. 18. *Poph.* 197. 1 *Lord Raym. Sceln v. Lowther*: to which the Chief Baron added the case of *Crispe v. Mickleburgh*, (*supra*) and the *Rector of Lilly's case in Hertfordshire*, *Hasfield v. Rawlin*, (2 *Wood's Dier.* 471.) But Mr. Baron Perrott raised a doubt in the mind of the court; whether a man having a farm in one parish with right of common appurtenant thereto in another parish is liable to pay agistment-tithe of such common to the vicar of the parish to which the common belongs: he said, he owned he had his doubts upon it, as the owner of the estate would in that case be paying double tithe for his estate. In consequence of this doubt, the case was adjourned to come on again the first day of causes in the next term by way of special argument.

In the case of *Scoles v. Lowther*, it appears that *Lowther* was parson of the parish of *Swillington*, and that *Scoles* lived in *Kippax* the next adjoining parish, and occupied a large tract of arable land there, and had forty acres of meadow and pasture in *Swillington*, and four acres of arable land. *Lowther* libelled in the spiritual court of *York* against *Scoles* for tithes of the cattle depastured in *Swillington*. *Scoles*, upon a suggestion that barren cattle kept for ploughing the land, and cattle for the pail for the use of the house, ought not by law to pay tithes, obtained a prohibition *nisi*, &c. And as to this, the court said, that if in this case there had not been arable land in *Swillington*, it is without doubt that the parson ought to have had tithes. For the reason why cattle of the plough are excused from the payment of tithes is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land: but here that reason would fail, for the parson of *Swillington* has no tithes of the land in *Kippax*. In the same manner where a man has wood in one parish and arable and in another; if he makes use of the wood in making fences for his arable land, he shall pay tithes to the parson of the parish where the wood grows. But it would be otherwise, if it were in the same parish. The same law, where the wood grows in one parish, and is spent in the owner's house in another parish. The question then here will be whether the ploughing of these four acres of land in *Swillington*, will excuse these cattle from the payment of tithes? And clearly, it will only excuse those cattle which plough the land of the four acres, and not those which plough the land in *Kippax*. For the parson ought to have something in lieu of the loss of those tithes, which can only be of the four acres in *Swillington*. Then *Powell J.* took exception to the suggestion, viz. where the plaintiff suggests, that these barren cattle plough the land, &c. but does not say, *per quod* the plaintiff had *uberiores decimas* in another place. And (by him) *uberiores decimæ*

Tr. 12 Geo. III. A. D. 1772. Scac.

Glasf v. Caldwell.

THIS was a bill by the rector of *Penscomb* in the county of *Hereford* for an account of tithes, both great and small, arising in the parish in the year 1770.

The bill charged, that the plaintiff had never entered into any agreement with the defendants for their tithes for the present year; but on the contrary insisted, that on or about the 19th day of *December* last, he had caused a notice in writing signed by him, dated the 15th of that month, to be delivered to each of the said defendants to the effect following, *viz.* "that the great and small tithes due to the plaintiff from the farms each of the said defendants occupied would be taken in kind the ensuing year;" that on the 20th day of *February* last, he caused another notice, signed by him, to be delivered to each of them, that he intended, pursuant to the former notice given in *December* 1769, to gather in kind all the said defendant's tithes, both great and small, which should arise and become due to him from the farms they severally occupied in 1770; and that they still refused to comply with such notices, and would not set out their tithes or make him any satisfaction for the same, except the pretended composition.

decima does not signify, only, that the parson will have better tithes out of the arable land, than he would have had if the cattle had not ploughed it, but it signifies, that he will have so much more tithes (than otherwise he would have had) as will fully recompence the loss of the tithes of the cattle; or they will (as he expressed it) out-weigh that loss. But as to this signification of *uberiores*, *Treby* C. J. doubted much. But in the principal case a prohibition was granted *quoad* the cattle only, which ploughed the land in *Swillington*: and as to the rest, *Lewther* had liberty to proceed below.

In the case of *Hatfield v. Rawling*, the plaintiff, as rector of *Lilly* in *Hertfordshire*, filed his bill (among other demands) for agistment-tithe of sheep, which were shorn and had dropt their lambs in the adjoining parish of *Offley*; and as the lands, where the sheep fed, were in the common-fields lying in both parishes, it was objected, that it would be double tithing, if the defendant having paid the tithe of wool and lamb to the vicar of *Offley*, was to pay agistment-tithe to the rector of *Lilly*. But the court said, that this was an inconvenience which the defendant had brought upon himself by not shearing a proportionable number of his ewes, and letting them yearn their lambs in *Lilly*. And the Deputy Remembrancer reported, that he could not recollect any instance where the court had directed a proportionable tithe of wool and lamb. In *Hil. 3 W. & M.* 1697, the court directed the full tithes in kind of wool to be paid, although the sheep had been but two months in the parish where they were shorn. Between *Perne* and *Swaine* of *Leverington* in the *Isle of Ely*.

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The defendants admitted, that the plaintiff was rector, and entitled to all the tithes arising in the parish, or to some composition for the same; and that they had the tithable matters in the year 1770 as charged by the bill; but they denied, that the tithe thereof ought to have been set out to the plaintiff, according to the notice stated in the bill.

The defendant *Caldwell* said, that from the time he entered on his lands in the said parish, which was about twenty-five years ago, to the month of *June* 1767, when the plaintiff was presented to the rectory, he had rented the tithes of the said lands, and all other his tithes, except poultry, chickens, and eggs, for which he paid tithes in kind, and a composition to the rector for his other tithes of 9 l. a year, on the 26th of *December* in each year; and that he had paid the said composition to the plaintiff for two years, who had given him a receipt for the same.

The defendant *Bennett* said, that he had occupied a farm for ten years past; that he had paid 3 l. 10 s. as a composition in lieu of his tithes, except as aforesaid; that he had paid the same to the said plaintiff for the said two years, and had got his receipts for the same. He admitted, that on the 19th day of *December* 1769, the plaintiff had caused such written notice, signed by him, to be delivered to the defendants, and that no new agreement had been made for their tithes for 1770, otherwise than aforesaid; but he insisted, that the said agreement for a composition of their tithes still subsisted, as the notice delivered was not regular, being too short a notice before *Christmas* 1769; and therefore that the plaintiff, notwithstanding such notice, was bound to accept from them the said composition money of 9 l. and 3 l. 10 s. in lieu of their tithes for the said year, ending at *Christmas* 1770.

The defendants said, that accordingly on the said 26th day of *December* 1770, they had respectively tendered to the plaintiff the said composition, which he had refused to accept; and they insisted, that they ought not to account for any of their tithable matters in 1770, or to make him in respect thereof any satisfaction other than the composition aforesaid.

Perryn and *Kenyon* for the defendants argued, that the notice to determine a composition for tithes must be reasonable; that such a composition is in the nature of a lease of tithes or of lands; that in the case of lands, there must be a notice of six months or such as the custom of the country requires; that the occupier ought to know time enough to determine his cultivation of his land; that

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in *Gulliver on the demise of Carter v. Burr*, at the assizes in *Kent* about four or five years before, on a motion for a new trial, the court of King's Bench held, that the same notice was necessary in case of tithes as in case of lands.

Lord C. B. Parker.—In *Bunb.* 15. it is said by Baron Price, that notice may be given before reaping. I am of a different opinion. *Hardr.* 203. *Salk.* 414. I cannot find that the court has fixed a precise time: but here the parties knew that the year ended at *Christmas*. If I was to lay down a rule, I should think *Old Michaelmas Day* a proper time. But in this particular case, I think the notice given before the year ended was sufficient.

Smythe B. of the same opinion.—Notice must be given. The question is, When? When the year begins, the composition must continue to the end. In this case, the notice was before the year ended. If it be holden, that notice must be given before preparation is made for the corn, it must be given the spring before; for then the land is prepared. This is not like the case of landlord and tenant. The case cited of *Gulliver and Burr*, was a lease of all the tithes of a parish. A tenant should have six months notice to provide himself; but that is not necessary for an occupier retaining his own tithes. The notice in this case is sufficient.

Adams B.—Some notice must be given. The question is, How long before the composition of the former year ends? The notice must be reasonable. Supposing the composition equal, it is for mutual benefit, and to prevent taking and setting out the tithe. It seems that notice any time previous to the ending of the year is sufficient. If you go by any other rule, it must be uncertain. If it was a composition for any particular species of tithe, such as wheat only, it might make a difference to the occupier, but not where it is a composition for all tithes.

Perrot B.—It has been always the received opinion of this court, that such a reasonable notice should be given, as might determine the farmer how he should cultivate his land. This was always Mr. Wilbraham's opinion. *Hardr.* referred to by Lord Holt; in *Salk.* 414. confirms this. I see no difference between a composition for all tithes, or for a particular species of tithe. The time for notice has always been understood to be about *Michaelmas*. Between landlord and tenant, the notice must be reasonable: custom has fixed it to six months. Suppose a man to have a modus for some particular land; if he knew his composition was not to continue, he would not sow his wheat on that land.

The court decreed an account with costs.

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M. 13 Geo. III. A. D. 1772. Scac.

Bree v. Chaplin.

THE plaintiff, as rector of *Rysome*, otherwise *Rysom*, in the county of *Lincoln*, filed his bill against the defendant, who was the owner and occupier of all the lands in the parish, for an account of tithes, both great and small, and also for certain lands in the possession of the defendant, which the plaintiff claimed as glebe lands belonging to the rectory.

The defendant admitted, that the plaintiff was rector, but denied, that he was entitled to tithes in kind; and he said, that he, the defendant, was, and had been ever since the plaintiff had been rector, sole owner and occupier of all the lands in the parish, and also of another tract of land adjoining, called, *Grange de Lyngs*; that parcel of the said tract of land had been for several years so blended and intermixed with some of the lands lying in the parish, that he could not with absolute certainty distinguish and ascertain the one from the other; but that he believed, that all the lands in the parish, distinguishing them in the best manner he was able from the lands belonging to the *Grange de Lyngs*, consisted of the several acres and parcels of land as stated in the answer, containing 671 acres; and that they lay in the said parish, and were of the yearly value of 320 l.; that the tract called, *Grange de Lyngs*, consisted of the several acres and parcels of land, also in his answer set forth, containing about 759 acres; that the said 759 acres were not in the parish of *Rysome*, or the tithable places thereof; and that, if they or any of them were, all the lands belonging to the said tract, were exempt from the payment of tithes in kind, while they were in his hands as owner thereof; for that before the council of *Lateran*, to wit, in the year 1215, *Grange de Lyngs*, and all the lands thereto belonging, were parcel of the possessions of the abbey or monastery of *Barlings*, in the said county; that the said monastery was one of the greater monasteries, it being in the king's books above the value of 200 l. a-year; that the abbot and monks thereof were of the order of the *Præmonstratenses*; that the said order was lawfully entitled to a discharge from the payment of tithes for such of their lands as they held in their own hands; that the said monastery was not dissolved by the statute of 27 H. 8. for the dissolution of religious houses, but came to the crown by the attainder of

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of the abbot, and by forfeiture, after the making of the act of 27 H. 8. and before the making of the act 31 H. 8.; that the possessions thereof were entitled to the benefit of the said act, and the owners of the possessions of the said abbey were thereby discharged of tithes; that there was only one house in the parish (exclusive of *Grange de Lyngs*) which was occupied by the defendant and his family; that there had not been for a great number of years in the said parish any church, chapel, or other place of publick worship, the church having been demolished before the reign of queen *Elizabeth*, and never since erected, nor any chapel or other place of publick worship, in the room thereof; that neither the plaintiff, as rector of the said parish, nor any of his predecessors, rectors thereof, from the time the said church was so demolished to the present time, ever performed any religious duty in the said parish, except what was necessary to be read and performed upon their inductions; for that he the defendant, and the several persons who had owned the lands in the said parish before him, and their families, for a great series of years, had resorted to divine service to the parish-church of *Burton*, adjoining to the parish of *Rysome*, or to some other neighbouring parish-church; that the minister of such parish for the time being officiated for them in burials, christenings, and in the holy sacrament, and other sacred functions; that he received, as he believed, his customary dues and fees as minister of such church and parish; and that the rectors of *Rysome* had not, within the memory of man living, and from the time aforesaid as he believed, been charged with or performed any duty in the said parish; that there never was, he believed, a parsonage-house or any glebe land in *Rysome* belonging to the rector thereof; that there was a terrier of the parish in the registry of the bishop of *Lincoln* of some such purport as stated in the bill, but that such terrier or certificate was no evidence against him, as it did not appear to be founded on just and proper grounds, and might be an *ex parte* instrument, calculated to give the rector a right to which he had no just title; that he knew not the particulars of such glebe land, if any such ever was, or the boundaries or descriptions thereof; and that if any glebe land had ever belonged to the rectory it was included in the composition real after mentioned. He then denied, that he, or any under whom he claimed, had wilfully confounded and blended, by inclosures or otherwise, any pretended glebe lands in *Rysome*, with any other lands belonging to him. He further said,

said, that he and his father, and such other persons as had been owners of the estate in *Rysome* under whom he claimed, had, from time immemorial, been lawful owners and in possession of all the lands in the said parish, and he insisted on the benefit of the statute of limitations made in the 32d year of *Henry* the eighth, and of all other the statutes for restraining suits for the recovery of lands after long possession in bar of the plaintiff's claim; and also that he had had possession of all the lands in the parish, either by himself or by those under whom he claimed for so long a time, as to bar the plaintiff from setting up any claim at this time to such glebe lands, if such there were; that the plaintiff's remedy, if he had any, was at law, and not in equity. The defendant then set forth the tithable matters he had on his said lands, as in the bill charged, and the values thereof; but insisted, that the plaintiff was not entitled to receive in kind any tithes for any of the things, or any oblations, obventions, offerings, or other ecclesiastical dues or payments, except as follows. He then stated, that an ancient, lawful, and valid composition real had been made before the reign of queen *Elizabeth*, by and between the parson, patron, and ordinary of the said parish, by virtue whereof certain ancient payments of 15l. 10s. 1½d. in money, were made payable half-yearly at *Lady Day* and *Michaelmas* in each year; namely 15l. to the rector of the parish, and 10s. 1½d. the residue thereof, to the archdeacon of *Stowe*, within the diocese of the bishop of *Lincoln*, for procurations and synodals; that the said composition real had been paid from ancient time before the reign of queen *Elizabeth*, to wit, from the time of making such real composition by the owner of the lands in the said parish (except *Grange de Lyngs* aforesaid), in lieu and full satisfaction of all tithes whatsoever, offerings, oblations, obventions, and other ecclesiastical dues, possessions, and rights whatsoever yearly arising, renewing, increasing, or payable upon or from all the lands therein, or the tithable places thereof or belonging to the said rectory; that the said ancient payment of 15l. had been constantly and regularly paid for a long series of years down to *Michaelmas* 1766 to the plaintiff's predecessors, rectors thereof, or some persons for their use, and by them to the said rectors, together with the said 10s. 1½d. as aforesaid; and he insisted, that by virtue of such composition real, he, and those under whom he claimed from the time of making thereof, had not been accountable to the rector for the tithes in kind of their lands in the said parish; and that he had since 1766 paid the

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the said 10s. 1½d. for procurations and synodals in the usual manner. He further said, that it appeared from a certificate in the fourth and fifth years of the reign of queen *Anne*, returned into the first-fruits office to entitle the rectory of *Ryſome* to her majesty's augmentation and bounty, that the following entries were made therein: "*Ryſome* rectory, the yearly value 15l. presentative, but no church, but one family;" and that the said rectory was or shortly would be entitled to her majesty's augmentation or bounty; that for the reasons aforesaid, he had refused to pay the plaintiff the tithes in kind; but that he was ready to pay the arrears of the said 15l. *per annum*, and to continue such payment as the same should grow due; that he had always been ready to pay the same, but that the plaintiff had refused to accept of it. He further said, that the lands called, *Grange de Lyngs*, were not within *Ryſome*, but that if they or any part thereof were, they were parcel of the possessions of the said monastery, as appears from the certificates or returns made in the First-Fruits Office in the 27th year of *Henry* the eighth, pursuant to a clause in an act of parliament, passed in the 26th of his reign, entitled, "the bill for the first-fruits, with the yearly pensions to the king," and also from certain accounts called, "the minister's accounts," returned into the augmentation-office, in the 29th year of the reign of the same king, concerning the lands, revenues, and possessions of the said monasteries." He further said, that he did not claim an exemption from the payment of tithes for any lands in *Ryſome*, except *Grange de Lyngs*; but that he claimed to pay an annual sum, in lieu of tithes arising from all the lands in the said parish, with such provisional exception in regard to *Grange de Lyngs*; and that he knew not, that from time immemorial, there had been any modus or customary payment, other than the before-mentioned one, yearly payable by all the occupiers of lands within *Ryſome*, to the rector of the parish, in lieu of all tithes yearly arising from all the lands by him occupied therein; that with respect to the payment of 15l. 10s. 1½d. *per annum*, he believed the same to be an ancient payment, for the origin whereof he could not account; that it had been invariably paid to the rector, in lieu of tithes, from the time his father purchased the said lands in the year 1721, to the time before mentioned; and that he had great reason to believe, that when he purchased the estate, the said annual payment was considered to be an effectual bar against the payment of tithes in kind to the rector of the parish.

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The plaintiff replied; the defendant rejoined; and upon the hearing, the court ordered a trial at law, upon the two following issues, viz. 1st, Whether the lands called, *Grange de Lyngs*, were in the parish of *Ryfelme*? 2d, Whether such an ancient, lawful, and valid composition was made before the reign of queen *Elizabeth*, (stating it in the very words of the answer).

On the first day of the next term, the plaintiff moved the court for a new trial of both the issues; and on the last day of that term, the report of Mr. Justice *Blackstone* having been read, (in which he stated the evidence on both sides, without giving any opinion of the verdict on the first issue, but expressed himself in a manner which imported his disapprobation of the verdict on the second issue), it was ordered, that a new trial be had of the issues directed by the decree at the next assizes for the county of *Lincoln* by a special jury of the said county, on payment of costs to be taxed.

From this order the defendant appealed to the House of Lords; and pressed for its reversal upon the following grounds:

1. The ancient and invariable payment of a certain sum of money in lieu of tithes, which was proved in the cause, without contradiction and without any proof, tradition, or even allegation, that tithes were ever paid or demanded in former times, was so strong an objection to the respondent's claim, that on his refusal to proceed to trial at the time expressly directed by the decree, the issues might have been taken *pro confesso* against him. He had every indulgence which could reasonably be expected, and after a fair and impartial trial, he ought to have acquiesced in the verdict. A further litigation at law may answer the purpose of vexation and expence, but cannot be desired from motives of justice.

2. If there had not been any unfavourable circumstance in the respondent's application, a new trial of either of the issues could not be supported on any of the grounds on which courts of equity have ever granted new trials. There is no imputation on the characters of the juries, nor any charge of partiality against any of them; it has not been contended, that the verdict is against law, or that it was founded on facts which were contradicted, or that any new evidence has been discovered, or can be expected.

The objection to the verdict and the sole ground insisted on for setting it aside is, that it is contrary to the opinion of the judge who tried the cause, and who appears, by his report, to have been dissatisfied with it.

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the jury at all events should not consider *Grange de Lyngs* (whether it were in the parish or not) as covered by the composition; the word "except" being in this, as in some other instances, synonymous with the words "not including;" and therefore the appellant submits, that this objection, founded on a grammatical nicety, contrary to the merits of the case, is not a sufficient ground for a new trial of that issue. But, if their lordships should be of a contrary opinion, the appellant hopes that the second issue shall (in that case) be varied in such manner as to leave the question indisputably open for a second trial on the merits, free from the objection taken by the learned judge to the form of the second issue as it now stands; and as this objection goes only to the verdict on the second issue, the appellant humbly hopes (in case it should prevail) that the verdict on the first issue shall remain.

The plaintiff on the other hand prayed an affirmance of the order for the following reasons:

1. For that the verdict upon the first of the said issues was given contrary to evidence; the grant of 30 Sept. 30 H. 8. was (it is submitted) conclusive evidence to prove, that the lands called, *Grange de Lyngs*, were at that time in the parish of *Ryfolm*, and no evidence was offered on the part of the appellant, to shew they had been separated at any time subsequent.

2. The verdict upon the second of the said issues was wholly unfounded upon any evidence adduced by the appellant. The mere proof of payment from the reign of queen *Anne*, and the value of the living at that time, was no sufficient evidence of a real composition made before the reign of queen *Elizabeth*, or of a uniform payment during that long period; and if there had been any weight in such evidence, it was entirely destroyed by the respondent's evidence, which proved, that in 26 H. 8. the reputed value of the living was only 4l. a year; that soon after the year 1599, the value of the living was returned by four neighbouring clergymen to the bishop to be only 10l. a year; that in 1601 the state of the living appeared, from the terrier, to be very different from that contended for by the appellant; and not consisting of a bare annuity of 15l. a year, clear of procurations and synodals, as alleged by the appellant in this issue.

3. For that, both the said verdicts were (as the respondent conceives) contrary to the opinion of the learned judge who tried the cause, as appeared by his report; and under those circumstances the inheritance of the church ought not to be bound by a single verdict.

4. For

4. For that the cause originated in the court of Exchequer, and the issues were directed for the information and to satisfy the conscience of that court; and the conscience of the court still remains unsatisfied by the present verdict (as is humbly presumed); all the Barons of the said court having been unanimously of opinion, upon solemn argument and full consideration, that a new trial ought to be granted.

Ordered and adjudged, that so much of the order complained of, as directs a new trial upon the first issue, be reversed; and that so much of the said order, as directs a new trial upon the second issue, be affirmed; and that the court of Exchequer, do give the proper directions for carrying this judgement into execution. Mar. 8,
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The Respondent's evidence on the first issue was to this effect:

An examined copy of a grant of 30 Sept. 30 H. 8. from the king to Charles duke of Suffolk of divers estates in which the parcels granted in fee are described thus: "All that ferme or graunge called, *Lyngs Graunge*, otherwise called, the *Graunge of Lyngs*, wth all and singler the membres and apptences in the countie of *Lincoln* to the late monastery of *Barlyngs* belonging or appteyning, and the rev'con & rev'cons thereof, together wth all and singular messuages, lands, ten'ts, rents, rev'cons, s'vices, medows, lessues, woods, underwoods, pastures, waters, mylles, comens, ways, fishings, rents reserved upon every lease, and all other hereditaments, comodities, and profits, with all and singular their apptences to the said ferme or *Graunge of Lyngs* belonging or anywise appertaining; and also all and singler messuages, lands, ten'ts, rents, rev'cons, &c. (*totidem verbis*) and all other hereditaments, comodities, and profits, with all and singler their apptences in *Lyngs* within the parish of *Ryfolm* and in *Swinethorpe* within the parishe of *Snelland* in the said countie of *Lincoln*, to the said monastery of *Barlyng* and to the late house or monastery of *Kyrkstead* in the said county of *Lincoln* or either of them late belonging or appteyning, and all and singler rents reserved upon all and every lease and leases thereof." In another part of the same grant the king grants to the said Charles duke of Suffolk and the heirs of his body, "All and singular those manors or lordships of *Barlyngs*, &c. and (*inter al*) *Ryfolm*, with all and singular rights, members, &c. in the said county of *Lincoln*, late belonging to the said monasteries of *Barlyngs* and *Kirkstead*, or either of them, and also all and singular those fermes or granges

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 " the said late monastery of *Barlyngs* belonging."

Bargain and sale of 4 May 3 Eliz. whereby *Adrian*, *William*, and *Anthony Stakes* bargain and sell to *George Saint Poll* all the manor of *Ryfolm*, with the appurtenances; and all those messuages, granges, lands, &c. in the parish, town, and fields of *Ryfolm*.

Several land and window tax duplicates were produced, and several witnesses examined, to prove that *Grange de Lyngs* had for many years past been assessed to those taxes under the denomination of *Risfome*.

This was the whole of the respondent's evidence on the first issue, except the evidence of some witnesses as to their opinion concerning the parish; but this being loose, and contradicted by witnesses on the other side, was waved by consent.

The appellant's evidence on the first issue was in substance as follows:

Licence to *Charles* duke of *Suffolk* to alien to *George Saint Poll* esq. *Lyng* Grange, otherwise *Grange of Lyngs*, with all its members and appurtenances, "*ac omnia alia hereditamenta cum suis pertinenciis situat' jacent' et existant' in predicto grangio vocat' Grange of Lyngs, A. C. in Ryfom in com. predicto seu alibi infra com. predictum dicto Grangio vocat' Grange de le Linges alio pertinen. seu spectant.*"

Grant from the duke of *Suffolk* to the said *George Saint Poll* of the *Grange of Lyngs*, with the appurtenances, in the county of *Lincoln*, and all messuages, &c. to the same belonging.

N. B. No mention is made of *Ryfolm* in this grant.

Grant from the king to the earl of *Hertford*, and his heirs, in which are these words; "*Omnia et singula maneria de Scothorne, Dunstan, Ryfom, &c. ac totum ill' grang vocat' Ryfom Grange.*"

Several subsequent conveyances were produced in evidence to shew that they were conveyed by distinct descriptions, and that wherever *Grange de Lyngs* is mentioned, it is described as lying generally in the county of *Lincoln*, without any reference to *Risfome*.

The instruments to shew these were two deeds, one dated 13th March 6 Car. 1. another, 10th February 7 Car. 1. a common recovery suffered in *Michaelmas* term 23 Car. 2. and an act of parliament in 12 queen *Anne* for vesting in trustees the estate of sir *John Brownlow* bart. in which act *Grange de Lyngs* is more particularly distinguished from *Risfom*, in the enumeration of towns, parishes, hamlets, or fields.

Certificate

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Certificate of the bishop of *Lincoln* to the governours of queen *Ann's* bounty, in pursuance of the act of 5 *Ann. c. 14.* in which the rectory of *Rifeholme* is certified to be of the yearly value of 15*l.* with the following description: "presentative, no church, and but one family."

It was proved by witnesses, that there were two ancient mansion-houses, one of which was at *Grange de Lyngs*, and called the *Warren-house*, and the other at *Ryfeholm*.

It was proved, that no person inhabiting *Grange de Lyngs*, had served parochial offices at *Rifeholm*.

Thomas Clerke proved, that he formerly rented land of about ten pounds a year, at *Grange de Lyngs* for several years, and about eight or nine years ago was examined by two justices, as to his settlement, on his application to them for relief; that after their examination of him, they made no order upon *Ryfeholm* for relief; that he afterwards went to *Mansfield Woodhouse* in *Nottinghamshire*, which was the place of his settlement before he lived at *Grange de Lyngs*, and was maintained there, and hath remained there ever since: this was the only instance of any inhabitant of *Grange de Lyngs* being reduced to become a parish charge, in the memory of any of the witnesses.

Several duplicates of the assessments of the land-tax in different parts of the county of *Lincoln* were produced in evidence, whereby it appeared, that the practice in that country hath always been to assess extra-parochial places with the next adjoining parish, and to have the same assessors and collectors for both; and this practice was confirmed by the testimony of several witnesses.

The Appellant's evidence on the second issue was to the following effect:

The bishop of *Lincoln's* certificate already mentioned in the state of the appellant's evidence on the first issue.

A great number of receipts at different periods of time, for the yearly payment of fifteen pounds to or to the use of the respondent's predecessors from the year 1706 to the year 1767, including both years, and for the procurations and synodals from the year 1703 to the present time, which receipts were vouchers to several accompts of lady *Brownlow's* steward, and such of the books of the said accompts as were signed by lady *Brownlow* and her steward, were produced with the said receipts.

A letter from Mr. *Adam Lugg* in 1721, directed to the master of *Baliol College*, produced by the respondent, on notice given by the appellant, expressing his doubt, whether he could get the rectory

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of *Ryfolm* advanced, as he takes notice, that the estate was then improved, and that he had with difficulty got the fifteen pounds.

A receipt of *June 3, 1721*, given by the appellants father to the lord *Tyrconnel* in full for the outgoings which are therein mentioned to be payable thereafter out of the manor of *Ryfolme*; among the particulars therein mentioned are the following articles; "to the rector of *Risbolme* fifteen pounds, and for procurations and synodals, ten shillings and three halfpence."

It was next proved that the living was augmented by queen *Ann's* bounty in the year 1767, by lot; and the respondent's receipts were produced to prove that he had received the interest arising from the augmentation from 1767 to 1773.

The appellant's counsel then offered to call old witnesses to prove ancient and invariable payments as far as the testimony of old witnesses could go; but the judge interposed his opinion, that such evidence was unnecessary. The counsel then took notice, that the depositions of the witnesses to this purpose had been read at the hearing of the cause; but the learned judge prevented the counsel from proceeding in this evidence by declaring, that they had proved sufficient to put the other side on proving their case.

The Respondent's evidence on the second issue.

Letters patent under the great seal, being a licence of alienation and appropriation of the advowson of *Risbolme* to *Baliol College*, proved by producing an *inspeximus* of the said licence, which *inspeximus* was under the great seal, bearing date 27 *Jan. 29 Eliz.*

Evidence was given by the burser's book of the college, of the payment of a yearly corody by the respondent and his predecessors to *Baliol College*, which was said, but not proved, to have originated a little before the restoration.

A subsidy book found in the bishop's registry at *Lincoln* about 11 *H. 8.* whereby it appears, that the rectory of *Ryfolm* was then returned to be of the yearly value of seven pounds, and that there was a pension of one pound thirteen shillings and four-pence payable out of it to the vice-chancellor, and ten shillings and one penny halfpenny, for procurations and synodals.

Another subsidy book found in the same office, whereby it appears, that in 26 *Hen. 8.* *Ryfolm* rectory was returned to be of the value of four pounds, with the like out-payments of one pound thirteen shillings and four-pence to the vicar, and ten shillings and three halfpence, for procurations and synodals.

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Some old subsidy, whereby it appeared that *Risfeholme* rectory was rented at seven shillings and two-pence halfpenny.

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A book was produced out of the registrar's office of the bishop of *Lincoln*, in which were copies of several terriers, two of which related to *Risfeholm*, containing an account of the glebe land said to belong to that rectory, but varying materially from each other in the description of the parcels, as well in quantities, as in situations and boundaries, in neither of which was any mention made of tithes, or any payment in lieu of tithes, one of which terriers was dated in 1580, and the other in 1601.

A paper was produced by the bishop of *Lincoln*'s secretary, found at *Bugden*, purporting to be a return to the bishop to several articles of inquiry not produced, wherein is mentioned the value of several rectories; and among the rest, *Ryfolm* rectory is therein mentioned to be of the yearly value of ten pounds, and in which, or in other papers produced therewith, were inveclives against prohibitions and moduses, and advice to all clergymen to vary their compositions for tithes, or to that effect. The above paper appeared to be signed by one *Roger Parker*, as rector of a particular parish therein mentioned, to which it appeared by other written evidence, that he had been instituted in 1599, but no account was given how, or by what authority such return was made, and therefore the paper was objected to by the appellant's counsel, as not admissible evidence, but such objection was overruled by the judge.

A book of accompts found at *Belton*, the seat of sir *Brownlow Cust*, from whose ancestors the appellant derives his title, containing steward's accompts, and among the rest, the rents of estates at *Risfeholme* and *Grange de Lyngs*; the first of which is mentioned to be one hundred and four pounds a year, and the latter thirty pounds a year; but the book containing this account was not signed by lady *Brownlow* or her steward.

M. 13 Geo. III. A. D. 1772. Scac.

Garrard v. Schollar. [3 Wood's Decr. 415.]

THE vicar of *Ramsbury* in the county of *Wilts* claimed all manner of tithes yearly arising in the parish; and stated, that the defendant, for thirty years past, had occupied therein divers tenements and lands which he had sowed with clover and turnips, and

The court will not decree an account of tithes beyond six years.

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had therefrom clover-feed and turnip-feed, which he had sold and disposed of; that he also held a messuage and malt-mill, in which he had ground malt, but that he had not paid the tithes of the mill or of the clover-feed or turnip-feed during the said time, although he had had each of the said tithable articles in every year.

The defendant said, that the plaintiff had been vicar of the parish for thirty years past; that he was entitled to all the tithes that his predecessors had enjoyed; that some years ago he, the defendant, had purchased the fee-simple of a small garden, orchard, and close of land in the parish; that he also occupied another cottage and close of land therein; that he had sowed clover and turnips thereon; that in the cottage there was a hand-mill erected for grinding malt; that it was worked by the hand and labour of man; and that it was an ancient mill; and he contended, that no tithes were due, or had ever been paid in the parish, either for the clover-feed, the turnip-feed, or the mulcture of the hand-mill.

The court ordered the bill, so far as it sought an account of tithes above six years next before the filing thereof, and so far as it sought an account of the tithes of garden stuff and the hand-mill, to be dismissed with costs; and that an account be taken of what was due for the tithes of clover-feed and turnip-feed arising on the close, in the answer mentioned to have been in the defendant's possession from the beginning of six years next before the filing of the bill.

H. 13 Geo. III. A. D. 1773. Scac.

Morgan v. Neville. [Eyre's MSS.]

An account of the tithes of milk claimed by the parson *sub modo*, viz. under a custom in the parish, to carry every tenth meal to the church porch, decreed without directing an issue at law.

THIS was a bill by the rector of *Little Leighs* in *Essex* for the tithe of milk, and it insisted that, by the custom of the parish, the tithe of the milk ought to be brought to the church porch for the use of the parson.

The defendant by his answer insisted, that he had set out every tenth meal of milk in clean pans or vessels; that the plaintiff might have fetched it away, if he had thought proper; and that having neglected so to do in a reasonable time, the defendant had thrown it on the ground; and he denied the custom stated in the bill, and prayed an issue to try it.

The answer was replied to, and to the replication there was a rejoinder, and witnesses were examined.

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The plaintiff's counsel proposed to read depositions taken in a former cause between the same parties. The defendant's counsel insisted, that it was not competent to the plaintiff to read them: but this objection was over-ruled, it appearing to the court, that the same question was in issue in that cause.

The depositions were accordingly read for the plaintiff, and also the depositions taken in this cause on behalf of the defendant.

After hearing *Skinner* of counsel for the plaintiff, and *Kenyon* of counsel for the defendant, Lord C. B. said—It is not an invariable rule in questions of this sort, to refer ourselves to a jury. It is only where there is a doubt that we do it both in cases of moduses and of customs. Here are four positive facts sworn to on the part of the plaintiff. The witness *Cooke* speaks of forty-nine years experience, and he proves that *Emby*, a former incumbent, took in kind from *Shattleworth*. The witness *Clapton* has known the parish thirty years, and says, that he paid the tithe in kind in 1765. Another witness *Smith* says, that he sixty-two or sixty-three years ago carried milk to the church porch. *Shattleworth* says, that his father carried it there for a year; and *Bedell's* daughter speaks to the same fact. Another witness proves, that he heard *James Smith* a former occupier say, that there was a custom to carry milk to the church porch.

Adams B.—I am not perfectly satisfied to decree without a trial at law. Though this is not a bill to establish a custom, yet it is pretty much to the same effect. It is not a bill merely for subtraction of tithes, but for subtraction *sub modo*, by not bringing the tithe-milk to the church porch. The evidence for the plaintiff is but slender. He has not produced above four or five instances of the existence of the custom, and no parishioner could be examined for the defendant.

Perrott B.—In this case the parish has been for the most part under a composition; so that we could not expect the production of many instances of the custom. There is a great deal of difference between a bill for subtraction of tithes, and a bill to establish a custom. I have known a modus established on the testimony of a single witness. A farmer will not set out his tithe in a way that is burthenfome to himself without a custom.

Decree, an account of tithes with costs to this time.

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P. 13 Geo. III. A. D. 1773. Scac.

Cleeves v. Knyfton. [Eyre's MSS.]

Qu. Whether on a bill to establish moduses, the validity of which the defendant declines trying, the defendant is entitled to his costs.

THIS was a bill against the vicar of *St. Decumans* in *Somerfetshire* for a discovery and the establishment of moduses. The defendant declining to try the validity of the moduses, it was decreed that ground that he should accept the same in future; that an *n. junction* should issue to the spiritual court in respect of the titles for which the moduses were set up by the bill; and that the plaintiff should pay the defendant his costs.—Lord C. J. *Eyre* makes a query as to the allowing of costs in this case, and cites *Clifton v. Orchard*, 1 Atk. 610. and *supra* 746.

P. 14 Geo. III. A. D. 1774. Scac.

Bateman v. Aisfroppe and others.

A custom to pay 3 d. a head for sheep, agistment between Candlemas and shearing day, and a fleece for every score brought in after the 2d of February, is bad. Agistment-tithes are payable for sheep depastured after the time of shearing and sold off or taken out of the parish before the next shearing day, though the sheep so sold or disposed of are immediately succeeded by others, and the flock, at the next shearing day, consists of the same number it did at the last. A custom to pay 4 d. an acre in lieu of the agistment-tithe of barren cattle above a year old, if fed one month in the parish, is good.

THOMAS Bateman clerk filed his bill, as vicar of *Whaplode* in the county of *Lincoln*, stating, that by ancient endowment or other lawful means the vicars of the said parish for the time being had for a great number of years been entitled to the tithe of hay, and to all fruits, revenues, and oblations whatsoever, to the vicarage belonging, except only the tithes of corn, wool, lamb, hemp, and flax, which were due and payable to the defendants the governors, as impropriate rectors of the said church, save that the vicars thereof, by virtue of such endowment, were entitled to the redemption of all wool and lambs within the said parish, from the number five and under; but above such number, the same were due and payable to the impropriate rectors as aforesaid: that the defendants *Aisfroppe, Collins, Goulding, Speechley, James* and *John Watson*, had, from time to time, kept, fed, and fattened on their said lands great numbers of sheep, which they sent to *London* or elsewhere for sale; and that all or most of such sheep, being by them kept some time after shearing thereof, the plaintiff, as vicar, by virtue of the said endowment, became entitled to the tithe agistment of all such sheep from the time of their last shearing till they were sold off fat, or taken out of the said parish for sale, and before the next shearing thereof; which tithe was well worth one penny per month for each sheep, they being mostly of a large size: and that the said defendants, in all or most of the said years, since the said 12th November 1768, like-

at the next shearing day, consists of the same number it did at the last. A custom to pay 4 d. an acre in lieu of the agistment-tithe of barren cattle above a year old, if fed one month in the parish, is good. wife

wife kept, fed, and depastured on their lands within the said parish divers beasts and other unprofitable cattle; the tithe of the agistment whereof the plaintiff ought to have been paid. The bill therefore prayed an account of these tithes.

The defendants, *Goulding, Aistrup, Collins, Speechley*, and *John and James Watson*, by their answer admitted, that the plaintiff was vicar, and, as such, was entitled to several species of tithes, but whether by ancient endowment or otherwise, they could not set forth; that they had heard and believed that for time whereof the memory of man was not to the contrary, there had been yearly and accustomedly such tithes paid to the vicar of the said vicarage as after-mentioned, to wit, tithe of hay in kind, or one shilling *per* acre as a composition in lieu thereof; for rape-seed, cole-seed, mustard-seed, and turnip-seed, the tenth of such seeds upon the land, or a shilling penny, to wit, a penny for every shilling for which such seed is sold, upon request, after being sold, at the choice of the vicar, he making such choice at the time of threshing the seeds: that the tithes of corn, wool, lamb, hemp, and flax, were, as they believed, due and payable to the defendants, the governors, as impropriate rectors of the said vicarage, or their lessees, and that the defendants *Blackith* and *Fowler* were the present lessees thereof: that they had been informed, and believed, that the vicars of the said vicarage were entitled to one halfpenny, and no more, for every fleece of wool, and every lamb, under five, called "odds of wool and lamb," and not to tithe in kind thereof: all above that number belonging to the impropriate rector aforesaid: they then set forth several modulus or customary payments in the parish: and stated the quantities of ground they occupied.

They referred to a schedule annexed to their answer, for the account of such sheep as were from time to time fattened on the lands they so occupied in the said parish in each year, and the time when such sheep were so sold or removed therefrom, since the Plaintiff's induction to the time of filing this bill.

They said, that they believed that the impropriate rectors of the said parish or their lessees had, from time whereof the memory of man was not to the contrary, been entitled to, and had received from the parishioners and inhabitants of the said parish, and did then receive from the defendants, and all other the inhabitants thereof, the yearly tithes following, to wit, corn, wool, lamb, hemp, and flax, in kind, and agistment tithe for all sheep sold out of the said parish between *Candlemas* and shearing day, which had been agisted

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on any lands therein, except those which were tithe free, of three pence *per* head; and also a composition tithe of one fleece in the hundred, reckoning six score to the hundred, every month for all sheep which were brought into the said parish after the 2d of February, and shorn therein, upon which day an account of such sheep usually taken by the impropriate rectors or their lessees.

They admitted, that during the time in the bill, they several fed and depastured sheep which were shorn in the said parish, and afterwards depastured on lands therein, and then sold off fat, or otherwise disposed of; an account whereof they had set forth in the said schedule: but they denied that any agistment tithe was due to the plaintiff in respect thereof, for that all the sheep that were so from time to time fed, sold, or removed, were as often replaced by fresh ones, purchased by defendants, and depastured on their said lands in their stead, and continued so thereon in course till the next shearing day, when they paid a full tithe in kind for the same to the impropriators or their lessees: they believed that whenever sheep had been shorn in the said parish, and depastured on their lands after the shearing thereof, and afterwards sold or removed therefrom before the then next *Candlemas* or counting day, that no agistment tithe was ever paid or demanded either by the impropriators or their lessees, or by the vicar thereof; but that such tithe wool in kind was always understood as a compensation or satisfaction from such occupier, he having paid a full year's tithe of wool, though such sheep had not been depastured more than half a year, which was frequently the case. The defendant *Aistrup* said, that he and his late father were tenants or lessees of the impropriate tithes for forty years before the present lessees *Blackith* and *Fowler*; and during all such time it was understood by the parishioners, that, in consideration of paying a full tithe of their wool for all sheep brought in after clipping day, and before *Candlemas*, and afterwards clipped in the said parish, they were not entitled to receive any agistment tithe for such sheep; nor did they ever receive or demand any, by reason such sheep as were shorn paid their whole year's tithe to the impropriators. These defendants admitted that they had kept on their lands, during the time in the bill, divers barren beasts which were fattened thereon, and afterwards sent to *London*, or other places, for sale: and that for time immemorial there had constantly been paid to the vicars of the said parish, 4 d. for every beast so sold or removed in lieu of agistment tithe thereof, provided such beast was above a year.

year old, and had been agisted therein above one month, but not otherwise.

The defendants, the governors of the free grammar schools of *Robert Johnson* clerk, and the defendants *Blackith* and *Fowler* their lessees, by their answer admitted that the plaintiff was, at the time in the bill, presented, instituted, and inducted into the said vicarage, and as such was entitled to receive several species of tithes under some endowment thereof; but not having seen the same, they referred to such proof as the plaintiff could make thereof: they believed that under such endowment the plaintiff was entitled to the tithe of cole-seed and wool and lamb, when under five, and not otherwise.

The defendants, the governors of *Guy's* hospital, said, they were lay rectors and impropiators of the said parish, and, as such, entitled to all tithes, except such as the vicarage was endowed with; they particularly claimed all the tithes of corn and grain, wool and lamb, save such as before mentioned, hemp and flax, and an agistment tithe for all sheep sold out before shearing which had been agisted on lands within the said parish; which agistment tithe, as to such sheep sold between the 2d of *February*, the usual day of taking an account thereof, and the time of shearing thereof, was, and from time whereof the memory of man was not to the contrary had been, as they believed, 3 d. for each sheep.

All the defendants then stated the demise from the governors to the defendants *Blackith* and *Fowler*, of all that the rectory and vicarage impropriate of the parish-church of *Whaplode* and the chancel of the same, and the glebe thereto belonging, and also all manner of tithes of corn, grain, and all other tithes whatsoever to the said rectory and parsonage belonging or appertaining, except all timber trees and annual contribution of beans, commonly called, pardon beans, usually paid and given to the poor by the farmers of the said parsonage, to hold the same to the defendants *Blackith* and *Fowler* from the 10th of *October* then last for 21 years, at the yearly rent of 365 l.: that they knew not nor ever heard that any agistment tithe was paid in the said parish for unprofitable cattle to any person whatsoever, save as aforesaid; but that such agistment tithe is due of common right to the defendants, as lay rectors and impropiators, and they therefore claimed to be entitled thereto.

To these answers the plaintiff replied; and the defendants rejoined; and witnesses were examined on both sides; and after hearing

1774. hearing counsel several days, and reading the answers of the said defendants, the occupiers; and the deposition of *Henry Hull*; an endowment from the registry of the bishop of *Lincoln*(s); the

(s) The endowment was as follows :

“ Archidiaconat', *Lincoln*' Ordinatio Vicariæ de *Quappelad*.

“ *Universis* Christi fidelibus presentem paginam inspecturis, *Ricardus* miseratione divinâ *Lincoln* episcopus, Salutem in Domino sempiternam. Ad universitatis vestræ notitiam per presentem scripturam volumus pervenire, quod cum dilecti in Christo filii religiosi viri, abbas et conventus *Croyland*, gratum consensum et assensum claræ et recolendæ memoriæ beati *Hugonis* quondam predecessoris nostri, ac etiam sanctissimi *Honorii* ecclesiæ *Romanæ* quondam summi pontificis, super hoc confirmationem de ecclesiâ de *Quappelad*, cujus fuerunt et sunt patroni, in proprios usus habendâ, dudum optinuissent, sicut in eorum instrumentis plenius continetur, nosque precibus devotissimis et sæpius iteratis, ut hujus concessioni et gratiæ, per dictum predecessorem nostrum gravitate religionis suadente, favorabiliter eis factæ nostrum consensum et assensum favorabilem in premissis benignius impartiri curaremus, pulsaverint, sollicitaverint, ac sollicitudine quam potuerunt interpellaverint; nos demum devotionem dictorum religionum speciale et sinceram in Domino dilectionem, quas erga venerabilem ecclesiam nostram *Lincoln*' ipsiusque pontifices semper habuisse dicuntur, attendentes, eorum dignis postulationibus et precibus animum nostrum duximus facilius inclinare et celerius postulata concedere.

“ Cum igitur in monasterio *Croyland* religionis gravitas, ordinis observantia, perseverantia sanctitatis, ac precipue hospitalitatis gratia, quæ in eo augere noscuntur, ipsum monasterium reddant et reddere debeant omnibus graciosum; nos, ad memoriam revocantes quod gratis gratiam postulantibus non sit aditus gratiæ precludendus, de dilectorum in Christo filiorum *Willmi. de Lessington* decani et capituli nostri *Lincoln*' assensu, et grato consensu, concurrente divinæ pietatis intuitu, et specialiter ad divini cultus officium inibi ampliandum, dedimus, concessimus, et presenti cartâ nostrâ confirmavimus monasterio *Croyland*, et monachis ibidem Deo jugiter famulantibus, ecclesiam de *Quappelad* in quâ jus optinent patronatûs, in proprios usus suos in perpetuum possidentiam, cujus quidem ecclesiæ proventus et redditus in hujusmodi usus convertant, et absque cujuslibet impedimento licite convertere valeant in futurum, vicario tamen in eadem ecclesiâ perpetuo servituro, in quâ vigere ordinamus et constituimus vicariam, de ipsius ecclesiæ proventibus pro suâ sustentatione suorumque ministrorum, et pro oneribus supportandis porcione congruâ reservatâ, porciones autem dictorum abbatis et conventus ac vicarii prelibati, per eosdem nobis et successoribus nostris, cum ipsam vicariam vacare contigerit, presentandi, ita duximus, auctoritate pontificali distinguendas, videlicet, Quod

“ Abbas et conventus supradicti habeant totam decimam garbarum ipsius ecclesiæ de *Quappelad*, cum totâ dominicâ terrâ, juribus et appendiciis suis, ad ipsam ecclesiam qualitercunque spectantibus, totamque decimam lini et canopi purè et absolutè: insuper habeant et quiete percipiant totam decimam lanæ et agnorum de totâ parochiâ provenientem; in velleribus lanæ scilicet et agnorum corporibus consistentem.

“ Vicarius autem nobis et successoribus nostris per predictos abbatem et conventum ad dictam vicariam successivè pro tempore presentandus per hanc ordinationem nostram ratione vicariæ percipiet et habebit in perpetuam totum alteragium dictæ eccle-

the induction of the plaintiff to the said vicarage of *Whaplode*; and the several depositions of *John Torner, Richard Edison, William Park,* and five more witnesses, on behalf of the said plaintiff; and reading the evidence on the behalf of the defendants, the depositions of *Joseph Greathead, Robert Busk, Henry Tatam, John Taulks,* and *Shadworth Smith*:

It was decreed, that the plaintiff's bill, as against the defendants, the impropiators, should be dismissed without costs; and that an account should be taken of what was due to the plaintiff for the tithe of agistment of all sheep which were kept, fed, and depastured on the lands occupied by the said defendants *Samuel Aistroppe,* and the others, during the time in the bill mentioned; and by them fattened and sold off, or otherwise disposed of, from the time of their last

fin de *Quappelad*, et totum emolumentum ab eodem alteragio qualitercunque proveniens, quocunque nomine censeatur, et in quibuscunque consistat vel consistere poterit; absolutum et inconcussibile; decimis garbarum, lini, canopi, lanæ et agnorum, et etiam tota dominica terra, cum juribus suis et appendiciis, ut predictum est, *duntaxat exceptis*. Habebit etiam idem vicarius et percipiet totam decimam sibi totius parochie integrè, et sine omni diminutione, et absque impedimento abbatis et conventus predictorum.

"Habebit insuper redemptiones lanæ et agnorum ubicunque in parochia a numero quinario et sic inferius descendendo computando, ubi scilicet secundum consuetudinem loci, ad decimam velleris et agni non poterit aliquatenus pervenire, omnimoda decima tum lanæ quam agnorum, ultra quinarium numerum ascendendo, proveniente, juxta consuetudinem supradictam, penes prefatos abbatem et conventum, ut preactum est, totaliter remanente, super quo dolum et fraudem ab aliquo fieri, sub pena majoris sententie, firmiter inhibemus.

"Ceterum ordinamus, quod abbas et conventus prenominati inveniant vicariis pro loco et tempore successive instituendis, mansum competentem in loco congruo, per eundem abbatem et conventum, in principio primi vicarii, post cessionem vel decessum *Simonis* nunc ipsius ecclesie *Quappelad* vicarii, in proximo instituendi constructum et competenter edificatum; deinceps si casus fortuitus, necessitas, vel vetustas hoc exigat, per vicarium qui pro tempore fuerit reficiendum vel de novo faciendum, cum oportuerit in loco prius assignato. Ordinamus insuper, quod primus vicarius, post cessionem vel decessum dicti *Simonis*, perpetuo per episcopum instituendus, et omnes successores sui qui pro tempore fuerint, onera ordinaria episcopalia et archidiaconalia debita et consueti sustineant et agnoscant, quodque libros, vestimenta, et cetera ornamenta ecclesiastica necessaria, et cancellum ecclesie, cum reparationem indigerint, sumptibus suis reparent et inveniant; ac etiam omnes ministros ad deserviendum vicarie prelibate necessarios exhibeant et sustineant: hanc autem ordinationem nostram in omnibus et singulis articulis supradictis volumus et ordinamus vires habere perpetuas, salvis in omnibus episcopalibus consuetudinibus et *Licet* ecclesie dignitate. Ut autem ordinationi nostre presenti plena fides adhibeatur, et dictis abbati et conventu vicariisque futuri perpetua securitas preparetur, presentem paginam nostro sigillo fecimus communiri. Datum menis Januarii anno gratie millesimo ducentissimo sexagesimo octavo, et pontificatus nostri anno undecimo."

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shearing,

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shearing, until they were sold off fat, and taken out of the said parish for sale, and before the next shearing thereof:

And that an account should be likewise taken of the tithe of the agistment of all barren and unprofitable cattle kept, fed, and depastured on the lands occupied by the said defendants in the said parish; except only such as were above one year old, and had been agisted within the said parish above one month, which were to be accounted for at the rate of 4 d. *per* head, in lieu and satisfaction of such agistment tithe, according to the modus or customary payment in the said defendants, the occupiers, answer mentioned.

Tr. 14 Geo. III. A. D. 1774. Scac.

IN this term there was a suit by Mr. *Kynaston* as executor of his father, who was impropiator of *St. Botolph without Aldgate*, against one *Piercy*, to recover an ancient composition of 20 s. *per annum* for the tithes of five houses in *St. Catherine's Lane* on *Little Tower Hill*; and his title being admitted, there was a decree accordingly. I take notice of this case, because it gives me an opportunity of introducing *Ivatt's* very important case respecting this parish, which was adjudged in the time of queen *Elizabeth*, and which I have lately extracted from the Decree-Book.

P. 16 Ja. A. D. 1618. Lunæ 11 die Maii.

Ivatt v. Warren and others. [MS.]

Plea to the jurisdiction of the court of Exchequer of the tithes of houses in London over-ruled.

WHEREAS *Elizabeth Ivatt* widowe exhibited an *English* bill into this honourable Court against *Symon Warren Thomas Burmsowe* and others defendants, setting forth thereby; That the late Queene *Elizabeth*, beinge seised in right of her crowne of *England*, of and in the impropriation of the Parishes Church and Rectorye of *St. Buttolphe's without Algate London* and all messuages, barnes, stables, oblations, obventions, duties, and appurtenances to the said Rectorye and Parishes Church belonginge, by her Grace's letters patents, dated the viiith date of *June* in the xxxth yeare of her reigne, demised unto one *George Puttenham* Esq. the said Rectorye and Impropriation for divers yeares yet to come, enduringe and under the rent of xxii^l *per ann.* and under divers covenants therein expressed: And after the death of the said late Queene the inheritance thereof

thereof descendinge to his Majestie that nowe is, It pleased his Majestie, amongst other things, to grant the reversion and the said inheritance unto one *Francis Phillips* and *Francis Moris* Esquires under the fee farme rent of xxii^l *per ann.* And sheweth that the said inheritance and the said interest of the said rectorye by meane conveyances coming unto Sir *Thomas Carsfield* Knight, *Robert Fulnetby* Esq. and *Thomas Dilworth* Gent. they by their indenture bearing date the xxth of *November* in the xiith yeare of his Majestie's reigne demised the said Rectorye with the appurtenances unto *John Ivatt*, the plaintiff's late husband, from the birth of our Lorde God next followinge after the date thereof duringe the terme of eleaven yeares; and that the said *John Ivatt*, beinge possessed of the said Rectorye by virtue of the said demise, made his last will and testament in writinge, and thereof made the plaintiff his executrix, and died, after whose decease the plaintiff prooved the said will, and thereby became possessed of the said lease and rectorye, and ought to receive all duties and tithes belonginge to the said Rectorie accordinge to the auntient customes, ordinances, decrees, lawes and statutes of this realme of *England* which the parishioners and inhabitants of the s^d parishe within the Cittie of *London* and liberties thereof ought to paye unto the plaintiff for the tithes of their severall howses after the rate of ii^s ix^d in the pounce; And that the defendants with others of the parishioners combyninge togeather goe about to defraude the plaintiff of her just and due tithes by takinge greate fines and reservinge small rents, which in tyme may be a meanes to impaire and diminishe his Majestie's fee farm; and for releife therein praied the ayde of the Court; uppon which bill proces of Subpena beinge awarded against the defendants, the said defendant *Warren* and others appeared in this court, and putt in their plea unto the said bill; and thereby sett forth that there is noe lawe for the payment of tithes for howses within the Cittie of *London* and suburbs thereof, but onely by a decree confirmed by acte of Parliament made in the xxxviiith yeare of the reigne of king *Henry* the eight, in which decree there is a provisoe, that if anye variance do arise for the payment of tithes in *London* and the liberties thereof, that then upon complaint made to the Lorde Mayor of the said Cittie, his Lorshipp shall end the same, or if he shall not end the same within three monthes, then upon complaint to be made to the Lorde Chancellor of *England* for the time beinge, his Lordship should end the same, and thereby demanded judgement of the Courte, whether they ought to make any other answere to the plaintiff's bill: As by the said plea

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plied, and the defendant *Warren* rejoyned and descended to a perfect issue, and since, there were severall orders for the bringinge in of the tithes into this Courte due from the defendant *Warren* after ii^d ix^d in the pounce accordinge to his rent of nyne pounds *per ann.* to be delivered to the plaintiff; but by an order of the xiith of *February* last the said *Warren* was to bringe three pounds fowerteene shillings threepence for three yeares tithes into this Courte, there to remayne untill the Hearinge of the cause, and for wytnesses to be examined on both parts, and publication to be had the first daie of this *Easter* terme, and the said cause to be hearde the second sittinge of this terme at *Serjeant's Inn*, as by the said order appeareth: And this present daie the said cause cominge to Hearinge before the Lord Chief Baron and the residue of the Barons of this Courte in the presence of the learned Councell on both parts touchinge the tithes due and paible by the said *Warren* for the howse he nowe dwelleth in, where upon a full and deliberate hearinge of the said cause, for that the defendant made noe sufficient proove of anye custome within the said parishe for the payment of tithes, or that the said howse was any more discharged by the braunches or provisoes of the saide decree and acte of parliament of the xxxviith yeare of *Henry* the eight, or that the covenant mentioned to be made by *Thomas Scott* and *Bridgett* his wife to the said *Amable* ought any waye to prejudice the plaintiff; and the saide Courte conceyvinge the meaninge of the said decree and acte of parliament was, that the inhabitants within the Cittie of *London* and liberties thereof ought to paye for the tithes of their howses after the rate of twoe shillings nyne pence in the pounce accordinge to the true value as the same were worth to be letten *per ann.* and that if the same had bene a shedd as was pretended, yet ought the same to be discharged of tithes noe longer then the same is contynued a shedd, for beinge converted to a dwellinge house the same ought to paye tithes accordinge to the true value: It is thereuppon ordered and decreed by this Courte that the said sume of three poundes fowerteene shillings threepence due for the three yeares tithes nowe remayninge in Courte shall be forthwith delivered to the plaintiff: and the said defendant *Symon Warren* to paie the residue of the tithes nowe due unto the plaintiff besides the said tithes now remayninge in courte: and shall from henceforth paie to the plaintiff or her assigns, or any other that shall be proprietor or farmer of the saide Rectorie for the tithes of the said howse xxiiii^d ix^d *per ann.* to be paid quarterly by equall portions

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accordinge to the true intent and meaninge of the said decree of the xxxviiith of *Henry* the eight: and that all those whoe shall hereafter inhabite and dwell in the saide house shall paie the tithes for the same as is before expressed accordinge to the true intent and meaninge thereof. And it is likewise ordered, that the said *Symon Warren*, his exors or admors, shall paie forthwith unto the plaintiff or her assignes the sume of sixe poundes thirteene shillings and fower pence towards her costs and charges sulleyed in the prosecutinge of the said suite.

M. 16 Geo. III. A. D. 1775. Scac.

Bedford v. Sambell. [MS.]

Rankness of a modus is a question of fact not of law. A custom to tithe lambs on St. Mark's day, though apparently unreasonable, is yet a fact for a jury to decide upon.

IN this case a trial at law was ordered on the following moduses.

First, "Whether the parson is to have the tenth lamb that shall be fallen within the parish, to be tithed by the parson and parishioner on *St. Mark's Day*, in manner following, viz. the parishioner or owner to take two, then the parson to take one, then the parishioner or owner seven, to make up the number ten; then the parishioner to take two again as he did at first, and proceed in the like manner throughout the whole; and if there remain any odd number, the parishioner or owner to pay 3 d. for every such lamb immediately, or at *Michaelmas*, the usual time."

Secondly, "Whether wool is to be tithed at shearing time in the same manner as lambs; and if there be any odd fleeces remaining, the parishioner is to pay 2 d. for each immediately, or at *Michaelmas*, the usual time of accounting."

Thirdly, "Whether, for every milch cow, there is to be paid to the parson 1 d."

Fourthly, "Whether, for all apples made into cyder, there due and payable to the parson for every hogsheaf of cyder so made 2 d. at *Michaelmas*." The issues to be tried by a special jury, and the judge to indorse, &c.

The said issues were therefore tried by a special jury, who found the same payable accordingly, in lieu of the tithes of lambs, wool, milk, and cyder; but on the 19th day of *June* 1776, a new trial was granted, on payment of the costs, to try the two moduses with respect to lambs and wool; and the defendants thereupon su

mitted to abandon the proof of the said two moduses respecting the manner of tithing lambs and wool, and declined proceeding to a new trial.

Upon the motion for the new trial, the court delivered themselves to the following effect :

Lord C. B. *Smythe*.—There is no objection to the modus for the cow, nor for cyder. The question is as to the modus for lamb and for wool. Wherever the payment approaches near the value, it is a fact to shew, that it cannot be an ancient modus. The value of 2s. 6d. for a lamb may come nearer to the value in some counties than in others. In the case of *Giffard v. Webb* the court had offered an issue, which the party did not proceed upon; and the House of Lords would not therefore reverse the order for the issue. The lamb and wool is so near to the real value, that I think the issues ought to be tried again. As to the day of payment, *St. Mark's Day*, it cannot be a reasonable time; for they cannot all live at that time without the dam. As to the objection to the evidence of the receipts, I think it good evidence. It is not proof by similitude of hand-writing. It was produced as an old paper coming from its proper place and without suspicion.

Eyre B.—I think the receipts were properly admitted. Such evidence is from necessity admissible. The receipt in its nature purports to be proper evidence, and it cannot be better established.

As to tithing lambs on *St. Mark's Day*, I do not think the usage only is necessary to establish a custom; but the reasonableness is likewise material. If it is impracticable, that ought to decide against the usage. If the lambs are of no value, or not of proper value on *St. Mark's Day*, the custom is unreasonable. It is proved, that lambs fall from *Christmas* to near *Midsummer*, and cannot live more than ten weeks old. Such a custom may not be bad upon the face of it, because the parson has a benefit; but still it ought to go to a jury; and if facts are proved to them, which shew that in the country, where the question arises, it is unreasonable, they ought to find against it.

As to the rankness of the modus for lambs and wool, such an objection used to be considered as a legal objection, but it is really a question of fact. The case of *Giffard v. Webb* decided only, that such a modus was not bad upon the face of it, but that it ought to be left to a jury. And in the present case, the jury ought to have given the objection to rankness its proper force.

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Hotham B.—The reasonableness of the time of tithing lambs is a fact to go to a jury; but I think, from the evidence it appeared to be unreasonable. And I think the payment for lamb and wool is so great, that it could not have been an ancient payment, and I should have been much better satisfied, if the verdict had been as to those issues the other way.

Perryn B. of the same opinion.

M. 16 Geo. III. A. D. 1775. Scac.

Lloyd v. Mortimer and Kirkman.

THIS was a bill by the plaintiff, as vicar of the parish of *Stapenhill* in the county of *Derby*, against the defendants, setting forth, that the plaintiff was, and for several years last past had been, vicar of the said vicarage, and, as such, entitled by endowment, prescription, or otherwise, to all tithes, of hay and grass, and clover cut for hay, and to all small tithes arising, renewing, increasing, and growing within the said parish, and the tithable places thereof, and particularly within the village, township, or hamlet of *Caldwall*, lying within and parcel of the said parish, and that the defendants had severally been the owners and occupiers of divers farms, lands, and tenements within the said hamlet, and that from *Midsummer* then last past, the defendants had divers tithable matters and things arising, renewing, and growing on the lands occupied by them in the said parish, the tithes whereof became due, and ought to have been paid to the plaintiff; it was therefore prayed, that the defendants might be decreed to account with the plaintiff, for the value of the said tithable matters and things, and might pay to him what should appear to be due on the taking such account.

The defendants, by their answer to the said bill, said, that they were occupiers of certain lands within the hamlet or village of *Caldwall* in the parish of *Stapenhill* in their said answer specified and mentioned, but insisted that the plaintiff was not entitled to any tithes in kind of any tithable matters arising within the said village or hamlet of *Caldwall* either from the said defendants or any other person whomsoever, owners or occupiers of any lands, tenements, or hereditaments, or any payment in lieu or respect thereof, other than and except that from time immemorial there had been paid by
the

habitants, proprietors, and owners of lands and tenements in the said village, township, or hamlet of *Caldwall*, to the said vicar and his predecessors, vicars of the said parish for the time being, the sum of 6 l. on the feast of St. *John* the Baptist in every year for and as a modus and in full payment and satisfaction for and in lieu of all tithes, rights, compositions, obventions, and emoluments whatsoever due or payable to the vicar for the time being of the said parish of *Stapenhill*, from the inhabitants, proprietors, and occupiers of lands and tenements within the said village or hamlet of *Caldwall*, in respect of such lands and tenements; and the defendants contended that such a modus or ancient payment of 6 l. had been confirmed by immemorial custom, as well as by a certain indenture, bearing date 22d September 1676, in the words following; that is to say,

“ Hæc Indentura facta inter Willielmum dominum Paget, Baronem de Beaufort, verum et indubitatum patronum vicariæ perpetuæ ecclesiæ parochialis de Stapenhill in comitatu Derbiæ, Litchfeldiæ et Coventriæ diocesi, et Johannem Lucas, artium magistrum, vicarium perpetuum ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill antedictæ, ex consensu et assensu reverendi in Christo patris et domini, domini Thomæ providentiâ divinâ Litchfeldiæ et Coventriæ episcopi, ex una parte, Samuelem Sanders de Caldwall, in comitatu et diocesi prædictis, armigerum, Edwardum Holland, de iisdem, generosum, Elizabetham Aston, viduam, Thomam Webster, Thomam Callingham, Willielmum Cox, Georgium Thrumpton, de iisdem, yeomen, Thomam Baxter, Ricardum Capenhurst, Thomam Baker, de iisdem, husbandmen, Thomam Jackson, de iisdem, carpenter, Thomam Corbitt, de iisdem, blacksmith, aliosque omnes incolas dictæ villæ de Caldwall prædictæ, Ricardum Bath de Linton in comitatu Derbiæ prædicto, et Robertum Nicklinson de Swadlincote in comitatu et diocesi prædictis, husbandmen, et Willielmum Lowe de Burton super Trent in comitatu Staffordiæ, et diocesi prædictâ, shoemaker, proprietas et occupatores quarundem terrarum, infra eandem villam de Caldwall prædictâ jacentium, ex consimili consensu et assensu reverendi in Christo patris et domini, domini Thomæ providentiâ divinâ Litchfeldiæ et Coventriæ episcopi, ex alterâ parte; TESTATUR, quod tam pro bono capellæ de CALDWALL infra villam de Caldwall prædictam et inhabitantium villæ prædictæ, quam pro bono ecclesiæ parochialis de STAPENHILL prædictæ, de quâ quidem ecclesiâ de Stapenhill prædictâ capella

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capella de Caldwell prædictâ membrum est; ac etiam pro, et in consideratione acquietantiæ et finalis concordantiæ, omnium differentiarum et controversiarum, de et concernent, omnes et singulas decimas, oblationes, obventiones, compositiones, aliaque jura, et emolumenta ecclesiastica quæcunque, vicario perpetuo vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, per inhabitantes, possessores, et occupatores terrarum, infra villam de Caldwell prædictâ jucentium, debitas et solutas; agreeatum, concordatum, et conclusum est, et per præsentis inter partes prædictas, ex consensu et assensu antedicti reverendi in Christo patris, concordatum est et conclusum, quod præfatus Johannes Lucas, vicarius perpetuus vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, ejusque successores vicarii perpetui ejusdem vicariæ perpetuæ, semel in quolibet mense, annuatim, in quolibet anno imperpetuum divinas preces in capellâ de Caldwell prædictâ, secundum formam libri communium precum, leget, et post lectionem earundem, juxta morem ecclesiæ Anglicanæ, concionabitur; præfatique incl.æ de Caldwell prædictâ, ac proprietarii et occupatores terrarum infra eandem villam jucentium, omnes et singuli, et eorum hæredes, executores, administratores, sive successores, eidem Johanni Lucas, et successoribus suis, vicariis perpetuis ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, summam sex librarum, legalis monetæ Angliæ, in plenam contentationem, satisfactionem, et exonerationem omnium et omnimodum decimarum, jurium, compositionum, obventionum, oblationum, juriumque, et emolumentorum ecclesiasticarum quorumcunque, infra eandem villam de Caldwell prædictâ, qualitercunque crescentium, provenientium, renovantium, aut aliquo modo contingentium, eidem vicario perpetuo, et quovis modo debitorum, aut solvi consuetorum, ad festum sancti Johannis Baptistæ annuatim in quolibet anno imperpetuum solvent; idemque Johannes Lucas vicarius perpetuus antedictus, ejusque successores, vicarii perpetui vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictæ, eandem summam sex librarum, in plenam contentationem, satisfactionem, solutionem, et exonerationem omnium et singularum decimarum, jurium, compositionum, obventionum, oblationum, et emolumentorum ecclesiasticorum quorumcunque prædictorum; et, ut præfertur, quovis modo debitorum aut solvi consuetorum imperpetuum ad festum prædictum accipient et recipient: IN CUJUS rei testimonium partes ad presentes sigilla sua iisdem mutuo apposuerunt vicesimo secundo die mensis Septembris, anno regni domini nostri Caroli Secundi, Dei gratiâ, Angliæ, Scotiæ, Franciæ, et Hiberniæ, regis, fidei defensoris, &c. vicesimo octavo, annoque Domini 1676. Et nos episcopus antedictus in fidem et testimonium præmissorum
sigillum

sigillum nostrum episcopale presentibus apposuimus. Will. ✕ Pagett, 1775.
 John ✕ Lucas, Tho. ✕ Litch. et Coventr.

The cause being at issue, several witnesses were examined on both sides.

On the part of the plaintiff it was proved, that the said village or hamlet of *Caldwall* is part of the parish of *Stapenhill*, and that the inhabitants of *Caldwall* contributed to the repair of *Stapenhill* church. It was also proved, that the vicar of *Stapenhill* for the time being had, as far back as the memory of witnesses went, collected and received tithes in kind for all hay, clover, lamb, wool, fruits, eggs, and pigs, and other small tithes arising within the other parts of the said parish, not parcel of the village of *Caldwall*.

On the part of the defendants it was proved, that *Caldwall* was a chapelry, in which there was a chapel of some antiquity, repaired by the inhabitants of the hamlet of *Caldwall*.

It was also proved, that the sum of six pounds had been raised by a levy according to the pound rate, and paid for many years to the vicar of *Stapenhill* for the time being, and they also proved that tithes in kind of the several articles claimed by the bill, had not, during the memory of living witnesses, been paid to the vicar of *Stapenhill*.

The cause came on to be heard before the barons of the court of Exchequer on 11th December 1775, and on the hearing there were produced and read, on the part and behalf of the plaintiff, the indenture dated 22d September 1676, in the defendant's answer mentioned :

An exhibit marked (C.) being a terrier, dated 23d June 1665 ; signed *John Lucas*, and others, wherein is the following entry, viz.

" *Item*, pigs, geese, wool, and lamb, are paid in the parish of *Stapenhill* and town of *Caldwall*, according to the ancient law, *fœtus ablactatus debet esse, antequam præstetur*, (to wit) when they are weanable, or of strength to live without the dam."

" *Item*, hay, hemp, flax, calves, colts, all manner of fruit and *Easter* offerings, are paid in the parish, and from all the town of *Caldwall*, without exception, for this vicarage anciently was endowed *omnibus minutis decimis*."

An exhibit marked (A.) being a terrier dated 29th September 1719, wherein is the following entry :

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"All manner of tithes (excepting corn only) as pigs, geese, wool, lamb, calves, colts, eggs, hay, hemp, flax, and all manner of fruit and *Easter* offerings, have formerly been paid in kind to the vicar of *Stapenhill*, by the inhabitants of *Caldwall*; but by an agreement made between the vicar and the said inhabitants bearing date 22d *September* 1676, by the consent of the patron and lord bishop, declared by their being parties to the same, the said inhabitants pay in lieu of all tithes and profits due from thence to the vicar, the sum of six pounds yearly, on *St. John Baptist's Day*, which the chapelwarden gathers and pays the day it becomes due."

An exhibit marked (B.) being a terrier, dated 12th *July* 1726; an exhibit marked (D.) being a terrier, dated 30th *October* 1701; and an exhibit marked (E.) being a terrier, dated 2d *February* 1705.

And on behalf of the defendants there was produced and read a terrier dated 23d *June* 1682, wherein is contained the following entry, *viz.*

"Item, pigs, geese, wool, and lambs are paid in the parish of *Stapenhill*, excepting *Caldwall*, according to the ancient law, *senes ablatatus debet esse, antequam præstetur*, (to wit) when they are weanable, or of strength to live without the dam."

"Item, six pounds of monies paid from the town of *Caldwall* as hay, hemp, flax, calves, colts, all manner of fruit and *Easter* offerings, are paid in the parish, excepting *Caldwall*, for this vicarage anciently was endowed *omnibus minutis decimis*."

On reading this written evidence, and the depositions, the court decreed, that it be referred to the Deputy-remembrancer to take an account of what was due to the plaintiff from the defendants respectively, for the value of the tithes demanded by the bill; and that the said defendants should pay to the plaintiff what upon such account should be found due to him for the value of the said respective tithes.

From this decree the defendants appealed to the House of Lords, stating the following reasons:

1. Terriers signed by the incumbent entitled to the tithes, and by the churchwardens or inhabitants of the parish, who are liable to the payment of the tithes, are admitted to be read in evidence, as the declarations of parties standing in opposite interests, but both interested in the manner of rendering the tithes within the said parish, and no terrier is perfect, or ought to be admitted in evidence, if signed by the incumbent only, or by the inhabitants only. The above terrier of

of 1665, which was received in evidence in this cause, appears to be signed by *John Lucas* the vicar, and by four persons, who are styled churchwardens, and are to be presumed to be the churchwardens of the church of *Stapenhill*, which is the parish-church, and not the chapelwardens of the chapelry of *Caldwall*. 1775.

It is therefore improper to be admitted in evidence, as only one of the parties signing the terrier is interested in the payment of tithes in *Caldwall* (namely) the vicar, and the rest of the parties not; and it is no more admissible in evidence, respecting the payment of tithes in *Caldwall*, than a terrier signed by the vicar of *Stapenhill*, and the inhabitants of a neighbouring parish. If the terrier be read, it only proves the impropriety of giving countenance to it as evidence; the substance of the terrier, so far as regards the present cause, being no more than the assent of the vicar and four marksmen to a proposition in the following terms, "pigs, geese, wool, and lamb, are paid in the parish of *Stapenhill* and town of *Caldwall* according to the ancient law *factus ablatus debet esse, antequam præstetur*; and hay, hemp, flax, calves, colts, fruit, and offerings, are paid in the parish, and from all the town of *Caldwall* without exception, for this vicarage anciently was endowed *omnibus minutis decimis*."

2. It is undoubted in this cause, that the vicar's right to tithe in kind within the chapelry of *Caldwall* was denied one hundred years ago.

That by an agreement, with the concurrence of the parson, patron, and ordinary, (which there is no reason to suspect to have been unfair), a certain annual payment was recognized and established, not as a composition for tithes payable in kind, but as a compromise of a disputed claim; that by means of such agreement having so long subsisted, all memory and trace of any other payment is lost and obliterated.

Under which circumstances, it is submitted, that it is inequitable to permit the vicar to avail himself of his general title; and the appellants therefore hope, that the respondent's bill will be dismissed.

On the other hand, the respondent in affirmance of the decree urged the following reasons:

1. The respondent proved his right to the several species of tithes claimed by his bill in other parts of the parish, and there was no pretence that any body else had any title to tithe in kind. The single question

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question is, whether the payment of six pounds is a legal exemption from payment of tithe in kind. There is no evidence that the payment existed before the deed of 22d September 1676; the terriers are evidence to the contrary, and the indenture of 22d September 1676 doth not contain any declaration of or reference to any modus or customary payment then existing within the said parish; but on the contrary, from the whole tenor and effect of the said indenture, it appears to be no more than an ineffectual attempt to make a real composition, at a time when all parties to that deed were by law disabled from making any composition whatsoever, binding or obligatory on the successors of the vicar; and therefore it is conceived, that the said indenture, instead of maintaining the pretensions of the appellants, affords the strongest presumption, that no such modus, or customary payment, as contended for by the appellants could have existed at any time when that deed was executed; otherwise it must be presumed, that such modus must have been known to the inhabitants of the village or hamlet of *Caldwall*, who are parties to that indenture; and it is highly unreasonable to suppose, that they would have omitted to take notice of such modus or customary payment, in case any such had then existed.

2. The parol evidence produced on the part of the appellants does not amount to any proof of such modus or immemorial customary payment, as contended for by the appellants; but on the contrary such parol evidence, when connected with the indenture of 22d September 1676, amounts to no more than a proof of an acquiescence under the temporary composition (introduced for the first time by that deed) on the part of the several vicars of *Stapenhill*, since the making of that indenture; which acquiescence is not in any sort conclusive or binding on the respondent.

The Lords affirmed the decree.

M. 16 Geo. III. A. D. 1775. Scac.

Travis v. Oxten. [Eyre's MSS.]

BILL by the plaintiff, as vicar of *East Ham* in the county of *Cheshire*, for tithes of hay and all small tithes from the owners of the demesne lands in the townships of *Netherpoole*, *Little Sutton*, *Great Sutton*, and *Whitby*, in that parish.

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The defendants, *Oxton* and *Healing*, admitted, that the plaintiff had been presented by the crown to the vicarage of *East Ham* in the year 1766; that in the year 1767 the same became void by his cession thereof; and that he was again presented thereto by the dean and chapter of *Chester*; but, whether he had been lawfully constituted vicar thereof they left him to prove; and denied that, to their knowledge, the vicarage had been immemorially endowed with the tithe of hay and hay-grass, agistment, and all other small tithes, particularly with respect to the lands and hereditaments severally occupied by them, and which, they admitted, composed the demesne lands or township of *Netherpoole*; and that the said lands were the inheritance of sir *F. Poole* bart. under whom they held the same as farmers and tenants. They all admitted, that the plaintiff as vicar, was entitled to divers species of tithes arising in some parts of the parish; but by what right they could not tell, he not having set forth in his bill any endowment or other right, and they having never seen any endowment or other evidence of any right under which he was entitled; but they said, he was not, either as vicar or otherwise, entitled to receive the same species of tithes throughout the whole parish, for that he and his predecessors had usually received different species of tithes from different persons, and in respect of different lands in the said parish. They further stated, that the said parish had formerly been called the parish of *Sutton*; that it was then also frequently so called; that it consisted of a rectory impropriate, as well as of a vicarage and of several different manors and townships, viz. the manor and township of *East Ham* with *Plimyard* and *Carlett*, the manor and township of *Hooton*, the township of *Childer Thornton*, the manor and township of *Netherpoole* and *Overpoole*, the manor and townships of *Great Sutton* and *Little Sutton*, and the township of *Whitby*; that at the time the greater monasteries were dissolved, in the thirty-third year of *Henry* the eighth, the said rectory impropriate, then called the rectory of *Sutton*, with the several manors and townships before mentioned, and the tithes belonging thereto, were in the possession of the abbot of *Chester* as part of the possessions of the greater monastery of *Saint Werburgh* in *Chester*; that the said possessions were then seized into the hands of *Henry* the eighth; that the said rectory, manors, lands, and townships, or some of the manors and townships, together with several other manors, lands, and hereditaments in the city of *Chester*, were granted by queen *Elizabeth* on

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The owners of lands in the township of *Netherpoole* insist on a modus of 40 s. a-year, in lieu of all small tithes and other vicarial dues; and that the tithes of hay belongs to their landlord, as the impropriator of the parish of *East Ham*.

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or about the nineteenth day of *December*, in the twenty-second year of her reign, to *Hugh Cholmondeley*, since deceased, under a reserved fee-farm rent thereof of 168 l. 19 s. 10 d.; that she afterwards granted the said rent to the dean and chapter of *Chester*; that the said *Hugh Cholmondeley*, or some of his descendants, afterwards sold and conveyed to different persons several different parts of the said rectory, manors, townships, and lands; that the township of *Netherpoole* consisted only of the hall and the demesne lands; that the ancestors of sir *F. Poole* had purchased the said township of the said *Hugh Cholmondeley*, or of some of his descendants, who were entitled thereto under the grant from queen *Elizabeth*; that sir *F. Poole* then was, and that he and his ancestors, and those under whom he claimed, had been, for time immemorial, owners of the said township; that the said sir *F. Poole*, and those under whom he claimed, had, for time immemorial, had and enjoyed; and that he then held and enjoyed, and was entitled to the tithe of corn, grain, and hay, arising in the said township of *Netherpoole*, as belonging to the said impropriate rectory; that the said sir *F. Poole* and his ancestors, and those under whom he claimed, and their lessees or tenants, had, for time immemorial, held and enjoyed the hall and the demesne lands of *Netherpoole* exempted from the payment of all small tithes, *Easter* dues, offerings, and other vicarial dues, on payment of a certain immemorial modus, pension, or customary payment of forty shillings a year, at *Easter*, to the vicar of the said parish. The defendants then further stated, that part of the said parish, called the township of *Overpoole*, was, all of it, they believed, the estate and inheritance of the said sir *F. Poole*; that he and his ancestors, and those under whom he claimed, had, for time immemorial, been entitled to, and had taken all the tithes of corn and grain within *Overpoole*, as belonging to the said rectory impropriate; and that the vicars of the parish had immemorially, or for some long time, by virtue of some endowment or prescription or otherwise, received, taken, and enjoyed, the tithes of hay, and all small tithes in kind, arising within *Overpoole*, or some payment in lieu thereof. The defendants then further stated, that the vicars of the said parish had, by virtue of some endowment or prescription or otherwise, had and taken, and that the plaintiff, as vicar, was then, by virtue of some endowment or prescription or otherwise, entitled to, and had taken, the tithes in kind of hay and hay-grass, and *Easter* dues, and other small tithes, in several parts of the parish;

parish; that in other parts he was not entitled to any tithe of hay but only to small tithes and vicarial dues; and that in other parts he was entitled to some moduses or payments in lieu of such small or vicarial tithes or dues. They further said, that they did not know whether the plaintiff, as vicar of the said parish, was entitled, by virtue of any endowment, prescription, or otherwise; or whether he had taken the tithe of agistment in any part of the parish; or whether the former vicars were entitled to, or had taken the same. They denied that the vicarage had ever been endowed with the tithes of hay, hay-grass, agistment, or any small tithes, throughout the whole of the parish; and insisted, that he was only so endowed out of particular townships or places therein; that the vicars had only taken and enjoyed such tithes partially from and out of particular parts of the parish; that in other parts thereof, the persons entitled to the rectory were entitled to and had enjoyed the tithes of hay, hay-grass, and agistment tithes; and that they, the defendants, as tenants to the present impropiator, were entitled to all the tithes of hay and hay-grass arising on the lands occupied by them respectively within the said parish, as the same were part of the demesne lands of *Netberpoole*. They admitted, that they had, in the year 1771, occupied the said demesne lands of *Netberpoole*, as also the hall-house called *Pool Hall* and the *Dairy House*; and set forth the quantity of land from which they had in that year mowed hay and hay-grass; and admitted, that they had carried the hay thereof away, without setting out the tithe, or making the plaintiff any satisfaction for the same, which they insisted they had a right to do, as the tenants of the said *Mr F. Poole*, who claimed the great tithes of the demesne lands, as part of the rectory impropriate. They also admitted, that in the said year they withheld all their small tithes, without making the plaintiff any satisfaction for the same, as they believed no small tithes whatever had ever been paid to any vicar of the parish for the demesne lands; and they insisted, that none were due for the said lands, except the said yearly sum of forty shillings in lieu thereof; and that the vicars had till that year received the same in full satisfaction for the small tithes or other vicarial dues of the said demesne lands.

The defendant *Whitehead* stated in substance the same matters relating to the plaintiff's being instituted vicar as the other defendants had done; and denied, that the vicarage was endowed with the

The land-holders of Little Sutton say the like as to

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tithe of hay and hay-grafs, or that he was entitled to the same from the tenements and lands he occupied in the said year in the township of *Little Sutton* ; and he described the lands and the number of acres they contained ; and said, that they were all anciently the estates and inheritance of the said *Cholmondeley* family under the afore-mentioned grant ; stating the title fully in his answer, as the other defendant had done. He further said, that the plaintiff had some times at *Easter*, when he received his *Easter* dues, received some payment for some kinds of small tithes in respect of those his tenements which were no part of the demesne lands, *viz.* for every milch cow, three half-pence ; every farrow cow, one penny ; for a servant, two-pence ; offerings for himself, three-pence ; for the rest of his family, sixpence ; and one penny, called the house-penny or smoke-penny, in lieu of all tithes of firewood or other things used and consumed in the house, and for all personal tithes due from any of the inhabitants of the house (except *Easter* offerings) ; a garden-penny, in lieu of all tithes of fruit and garden-stuff ; an hen-penny in lieu of fowls and eggs ; and a tithe-penny, otherwise tin-penny, otherwise tithing-penny, as a modus in lieu of all other small tithes and vicarial dues in kind, not at times taken in kind, and therein excepted, as being so taken in kind as aforesaid, and except offerings ; and therefore he insisted, that the plaintiff was not entitled to any other small tithes arising within the said parish. He admitted, that in the year 1771 he had cut hay and hay-grafs upon his said lands, and had carried the same away, without setting out the tithe thereof, or making any satisfaction for the same ; and he insisted, that he had a good right so to do, the plaintiff not having any right thereto. He further said, that he had tendered the several moduses or customary payments to the vicar.

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The defendant *Davies* stated the same in respect of the tenements and lands occupied by him in the township of *Great Sutton*.

The defendant *Whitehead* put in the like answer for her tenements and lands lying in the township of *Great Sutton*.

The defendant *Maddock* put in the like answer for his farm and lands in the township of *Whitby*. He further said, that no tithe-hay in kind had ever been paid or was payable to the vicar of *East Ham* for any of the lands heretofore part of any of the tenements called *Robinson's Tenement*, *Salmon's Tenement*, or *Lightfoot's Tenement* ; but that in lieu thereof there had been annually paid by the occupiers of the said tenements respectively to the vicar the follow-
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ing moduses: the sum of one penny, in lieu of the tithes of all the hay yearly arising on *Robinson's Tenement*; of one penny, in lieu of tithe-hay of *Salmon's Tenement*; and the same for *Lightfoot's Tenement*; that the said moduses so paid had been usually called tilt-penny by the vicars of the parish and by others; that the same were payable by the occupiers of the said three tenements respectively to the vicar annually at *Easter*; and that the plaintiff had received the same to *Easter* 1771; and he set forth the various other lands which he occupied, and which of them paid tithe-hay, and which were exempt from such payment; and averred, that he did not believe that any part of the separate farms occupied by him were, at any time within the memory of man, inclosed from the ancient common or waste lands lying within that part of *Whitby* which was within the parish of *East Ham*.

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The plaintiff replied; the defendants rejoined; and witnesses were examined for all parties; and after hearing counsel for several days; and receiving a great body of evidence; the judgement of the court was delivered by *Eyre B.* the Lord C. B. *Smythe* being too much indisposed to attend.

Eyre B.—This is a bill brought by the plaintiff, who is vicar of the parish of *East Ham* in the county of *Chester*, against all the defendants, who are six in number, for an account of tithe-hay, and against two defendants, *Oxton* and *Healing*, for an account of small tithes also. The plaintiff claiming, as he must do, under an endowment, five out of the six defendants absolutely deny that the vicar is endowed of the tithe of hay. As to the defendant *Muddox*, he, having set up a modus by his answer in lieu of tithe of hay, does admit, that the vicar is *sub modo* endowed of this species of tithe; and the same observation applies as between the defendants, *Oxton* and *Healing*, respecting the vicar's endowment of small tithes, they having set up a modus payable to the vicar in lieu of these tithes.

The vicar has entered into proof of his endowment both of tithe of hay and small tithes. No instrument or endowment in writing is produced; but the plaintiff has read evidence of the vicar's having enjoyed those species of tithes, which is evidence of prescription, which supposes an endowment. Upon the proofs it appears, that there are eight townships within this parish; that tithe of hay in kind is yielded to the vicar throughout three townships, viz. *East Ham*, *Childerthornton*, and *Overpoole*; and in part of two townships, viz. all the townships of *Netherpoole* and *Hooton*, except the hall and demesnes, and in *Whitby* for the lands lying in that part of *Whitby* which

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which is in the parish of *East Ham*, and belonging to houses situated in that part of *Whitby* which is in the parish of *Stoke*: that a tilth-penny in lieu, as all the witnesses agree, of tithe-hay has been paid to the vicar throughout the township of *Great Sutton*, and all *Little Sutton* except the Hall and demesnes, and for the rest of the township of *Whitby* lying in the parish of *East Ham*; and lastly, that a composition, which certainly may have been, and almost all the witnesses agree was always understood to be, in lieu, *inter alia*, of tithe of hay, has been paid to the vicar for the remaining part of the parish, (that is to say) for the township of *Netherpoole*, and for the two Halls of *Little Sutton* and *Hooton*. In addition to this evidence there has been read an extract from a parliamentary survey, in which it is stated, that there is belonging to this vicarage the tithe of hay in *Childerthornton*, *Hooton*, *Overpoole*, and *Netherpoole*; and it is in proof, that the impropiators have collected tithes of corn and grain only throughout the parish: and though they and their tenants have retained the tithe of hay arising upon their own demesnes, the observation weighs with us, that this retainer being accompanied with the circumstance of a composition paid to the vicar, which certainly may be for tithe of hay, cannot necessarily infer a right in them as impropiators to this species of tithe. And as to the small tithes, the witnesses all agree, that the vicar has always received these tithes, or a composition for them, throughout the parish. Upon this state of the proofs we are all agreed, that without laying much stress upon the parliamentary survey, which cannot be understood to be very accurate as to all the vicarial dues, the vicar has given sufficient evidence of an endowment of tithe of hay throughout the parish; and as to small tithes, there is certainly no room for question concerning them.

It was objected, and very much pressed in argument on the part of the defendants, respecting the evidence of an endowment of tithe of hay, 1st, that part of the evidence referred to ought not to have been read, as being evidence of things not in issue in the cause; and 2dly, that proof of the payment of a modus cannot possibly be applied to support a demand of tithes in kind. As to the first of these objections, it is true, the court is to decide *secundum allegata et probata*, and it must be admitted that in our pleadings which are borrowed from the civil law, the allegation is indispensably necessary to introduce the proof. But this rule extends thus far only; to require that the several points of charge and discharge to which the examination is to be directed should be alleged or stated in the pleadings.

pleadings. Such facts as constitute the points in the cause are to be in issue. But there is a well-known legal distinction between the fact and the evidence of the fact: though the parties are bound to state the fact, they are not bound to disclose their evidence. Now to apply this doctrine to the present case—A vicar claims to be entitled by endowment: he states an endowment; the endowment is denied. The endowment is a fact, or a point in issue between the parties: they are to examine witnesses and to adduce their evidence on both sides to this fact or point in issue between them. A writing may be the evidence of the endowment: it was admitted expressly in the argument, that the writing need not be alleged or be in issue. But a writing is but one species of evidence of an endowment; enjoyment is also evidence of an endowment. If a writing, being the evidence, need not be expressly alleged; I suppose it must be admitted, that the enjoyment need not be stated. If the fact of enjoyment need not be stated, I suppose the infinite variety of facts and circumstances which when combined together in evidence conclude to the fact of enjoyment, will not be expected to be stated. The true objection to be taken in such a case is, not that they have examined to facts not in issue, but that they have examined to facts, which are not evidence of facts in issue. And the second objection applies in this way; for they say for the defendants, that proof of a payment of moduses, good or bad, cannot possibly be applied to support a demand of tithes in kind. Let us examine into the ground of this objection. If the vicar proves that he is endowed of the tithe of hay, that endowment entitles him *prima facie* to demand tithe in kind, just as the common law right of a rector entitles him; because tithe in kind is the original legal right.

This doctrine was expressly laid down in the case of *Fox v. Rutt* in *Bunbury* 87. *supra*, and determined on the 16th of November in *Michaelmas* term 1721. Enjoyment is admitted to be a species of evidence of endowment of tithe of hay: now surely the receipt of a pecuniary or other composition in lieu of tithe of hay in kind, is as much an evidence of the enjoyment of the tithe of hay in lieu of which it is paid, as the receipt of tithes in kind is. It is a manner of taking the tithe of hay; and one manner of taking the tithe is as much evidence of the enjoyment of the tithe, as another manner of taking it. If the receipt of a composition in lieu of tithe is enjoyment of that tithe; if enjoyment is evidence of an endowment; if endowment is *prima facie* a title to tithe in kind; it

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should seem that a bad modus paid in lieu of tithe of hay may be applied to support a demand of tithe-hay in kind. For what is a bad modus? It is a composition pecuniary or otherwise for the particular species of tithe in lieu of which it is paid. It is a good composition so long as it is submitted to; if it has been in fact received, it is a bar to an action or a bill for an account of tithes for the time; for it is a satisfaction *pro tempore*. As soon as it is broken, the original right, the right to demand the thing in specie for which it was substituted, revives; and therefore it is, as it seems to me, that when a modus is disallowed, it is of course for the court to decree an account of tithes in kind. I desire it may be understood there is a manifest distinction between disallowing a modus that is proved, and not admitting proof of a good modus which there is not evidence sufficient to support. The principles upon which the court decree an account of tithes in kind upon disallowing a modus, seem to apply to prove that the vicar may even establish his title to an account of tithes in kind by the medium of proof of a bad modus only in the first instance: for it amounts to proof of payment of a temporary composition in lieu of the tithes demanded; which is evidence of enjoyment, which is proof of an endowment, which is a title to tithes in kind. It is not necessary to go farther in this cause, in which there is a great body of evidence of an endowment, than to determine, that the evidence of the payment of compositions in the several townships is admissible evidence of an endowment. And so far I think we steer clear of all the authorities which have been cited.

It was much urged to us upon the evidence, that the vicar was to be considered as endowed of a portion only of the hay-tithes of this parish. But, unless there were evidence of the rector or some other person dividing this species of tithes with the vicar (the contrary of which is in proof) there seems to be no reasonable ground for narrowing the endowment, which, in respect of all the other tithes payable to the vicar, is undoubtedly general throughout all the townships.

The vicar having proved his endowment, the defence which the defendants have insisted upon, falls next under our consideration.

And first as to the defendants, *Oxton* and *Healing*, who are occupiers of all the lands within the township of *Nether Poole*, against whom an account is prayed of tithe-hay and small tithes. These defendants claim to be entitled to the tithe of hay, hay-grass, and agistment of the lands in their occupation under the *Poole* family,
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who derive, as is insisted by the answer, from *Hugh Cholmondeley*, grantee of the crown of the rectory of *Eastham* formerly called the rectory of *Sutton*, and parcel of the possessions of the abbey of *St. Werburgh* in *Chester*, which has since been conveyed in parcels to different persons. And the defendants claim to be exempt from the payment of all other small tithes and vicarial dues upon payment of a modus, pension, or immemorial annual payment of 40 s. out of the demesne lands of *Netherpool* in lieu of all small tithes, oblations, and other dues. In support of the title to the tithe of hay, hay-grass, and agistment, relied upon by the defendants, it was stated, that the family of the *Pools* were the improper rectors of so much of the rectory as extends through the *Pools*; that of common right the *Pool* family were therefore entitled to all tithes whereof the vicar was not endowed, and that the retainer of the tithe-hay in kind in *Netherpool* was a clear proof that the vicar was not endowed with tithe-hay in *Netherpool*, and that that tithe belonged to the rectory. It turns out in proof that the estate of the *Pool* family was never parcel of the possessions of the abbey: no conveyance has been shewn of any part of the rectory from the *Cholmondeley* to the *Pool* family, nor do I recollect a tittle of evidence in the cause of any part of the rectory being in the *Pool* family before the year 1752, except the fact of their retaining the tithes of hay for *Netherpool*, and the tithes of corn and grain in *Overpool*. There is evidence a conveyance in *October* 1752 of a rent of 20 s. issuing out of the manors, lordships, or townships of *Overpool* and *Netherpool* in lieu of tithes in those townships. This conveyance goes a considerable length towards proving that the rectory even as to *Overpool* and *Netherpool* is yet in the *Cholmondeley* family, or at least was in them so late as the year 1752, up to which time they received an annual payment in lieu of tithes out of both townships; and that accounts for the *Pool* family retaining the tithes of the rectory up to that time upon the ground of composition, not title; and one rent issuing out of both townships in lieu of tithes in both townships without distinction affords neither proof nor presumption that the rector is entitled to different species of tithes in one township and the other. And as to the retaining of the tithes of hay in *Netherpool*, the *prima facie* evidence arising from that is fully rebutted by the general evidence in the cause, that the rector is entitled to the tithe of corn and grain only; that the vicar is entitled to tithe of hay; that he does in fact take it in kind in *Overpool*, and that he receives a composition for it in *Netherpool*,

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which alone accounts for the retainer. We are of opinion therefore that these defendants, *Oxton* and *Healing*, have totally failed in their proof of title to the tithe of hay, hay-grafs, and agistment; and therefore the vicar's endowment being proved, if there were not any more in the cause, it should seem that the vicar is entitled to a decree of an account for these tithes in kind. As to the *modus* set up by these defendants in lieu of small tithes, oblations, and other dues, it is agreed on all hands that no tithes in kind have been received by the vicar from *Netherpool* within the memory of the witnesses; that there has been a composition paid to the vicar by the occupiers of *Netherpool* in lieu of something: the parties differ as to the *quantum* of the composition, to what it has extended, and upon the question, whether it is binding or temporary, in respect of the proportion it bears to the real value of the tithes. Upon that *quantum*, the plaintiff's witnesses say, the keep of a horse or a cow is a part of the composition, which two witnesses upon the part of the defendants deny, and state to be merely gratuitous. And whereas the answer sets up this composition as a *modus* in lieu of small tithes; the witnesses on both sides agree, that the composition is as well for hay, hay-grafs, and agistment, as for small tithes: and there is some slight evidence that it does not extend to fees for burials, marriages, &c. What the composition is, and to what it extends, must be settled, before we can reach the question of the rankness of it: and this, as Mr. *Muddox* for the defendant truly observed, is not properly matter of law, but of argument inferring fact. These are questions therefore proper for an inquiry before a jury, and they will be all open to discussion upon an issue: and therefore we incline to direct an issue upon the *modus* pleaded, with liberty, as usual, to indorse the *posse*; and we are of opinion that the direction upon the other part of these defendants' case should be reserved till after the trial of this issue. It was with a view to this I said if there was nothing more in the cause there ought to be a decree for tithes in kind of hay. The finding upon the issue directed may have an important effect upon the other part of the case. If upon the finding it should appear, that the defendants have mistaken that part of their case, but that there is in fact a good *modus* which covers all the tithes demanded by the bill, which without prejudice to the argument upon the rankness stands in point of fact confessed upon the plaintiff's own evidence; it will be to be considered, whether the court is so entangled in its forms as to be obliged to decree an account of tithes in kind against the truth

truth and justice of the case. The counsel for the defendants have pressed for an issue, whether the vicar is entitled to the tithes demanded: but as we are satisfied with the evidence of the endowment, which distinguishes this case from that of *Carte and Ball*: we think the issue ought to be upon the modus and not upon the endowment.

The defendant *Whitehead*, whose case is next to be considered, is the occupier of five tenements in the township of *Little Sutton*, three of which he is also the owner of. He by his answer states the township of *Little Sutton* to have been parcel of the possessions of the abbey, and to have been granted to *Hugh Cholmondeley*; that the grantee enjoyed the tithe of corn and grain and hay through that part of the township which was not demesne: that the purchasers of estates sold off by *Hugh Cholmondeley*, and the defendant amongst others, purchased all the tithes of hay, hay-grass, and agistment of their estate, and have ever since enjoyed those tithes; and so in an awkward manner he derives a sort of title in himself to the tithe demanded in respect of three tenements; and in the owner of the other two, of which he is only the occupier. This defendant also states a tilth-penny to be payable to the vicar of *Little Sutton*, but does not apply it to the tithe of hay. Without resorting to the act of parliament of 6 *Geo.* 2. read in evidence, which makes it impossible that the defence should be true, upon the rest of the evidence there is so little colour for it, that I am surprized to find it stated in an answer taken upon oath. It appears, that the grantee of the lands in this township was also grantee of the rectory, and therefore he enjoyed such tithes as he was entitled to, as rector: the tithes of corn and grain, which are the only tithes which have been in fact collected throughout any part of the parish for the rector, still remain in the rector. *Wecker*, one of the witnesses in the cause, is or was his tenant of these tithes in *Little Sutton*. Defendant *Whitehead* must have known that these tithes were in fact not sold, though I am willing to give him credit for not knowing or not remembering that an act of parliament restrained the rector from selling the tithes belonging to the rectory in *Little Sutton*. That the tithe of corn and grain was not sold was enough to put *Whitehead* upon his guard not to hazard an assertion that the tithe of hay had been sold, without first informing himself whether there was a probability or a possibility of its being true. The language of the answer betrays a consciousness of the fact of the tithes belonging to the rectory never having been sold: for the answer states

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the grantee to have enjoyed the tithes of corn, grain, hay, hay-grass, and agistment; and then states that he purchased the tithes of hay, hay-grass, and agistment, taking no notice of the tithe of corn and grain, nor attempting to account for the selling off the tithe of hay, and reserving the other tithes. Now what is the evidence offered by this defendant of his having purchased these tithes, or of any other purchaser of estates in this township having purchased them? It was observed by Mr. *Skyner*, that he had not even produced his own purchase-deed as an apology for his answer. He has not made it appear that the grantee ever took upon himself to convey this species of tithes with any one estate within the township. Comparing the answer with the proof, the whole is a piece of sophistry built upon the single fact of tithe-hay in kind having never been collected in the township in the memory of the witnesses. Not having been collected it was retained; being retained, it was enjoyed by the purchasers of the estates: if so, it must have been purchased with the estates of the grantee: and if the grantee sold it, he must have had it to sell. But, unfortunately for this argument, all the witnesses apply the tilth-penny, which the defendant acknowledges has been paid to the vicar in *Little Sutton*, to the tithe of hay; which accounts for the tithe of hay never having been collected in kind, and at once refutes the whole argument. Mr. *Whitehead's* defence being thus clearly falsified, we are of opinion that he must be decreed to account for tithe of hay in kind and with costs. If it should be objected that here likewise the plaintiff has shewn that there is a modus payable in lieu of tithes of hay, and therefore he ought not to recover tithes in kind against his own shewing, though the defendant has failed in the defence he has set up; I answer, that it will be sufficient for the present to say, that the fact of the payment of this pecuniary composition, which is called a modus, being established with little or no contrariety in the evidence, and it being objected to as a modus upon a ground of law and not of fact, it is now ripe for the opinion of the court, and it so happens, that we are called upon to decide upon it in the case of another defendant; and, consequently, then will be the proper time to dispose of this objection.

The defendant *Davis*, whose case comes next in order, is the occupier of three tenements in the township of *Great Sutton*; and he states the same sort of title to the tithe of hay, hay-grass, and agistment, in the owners of those tenements, as *Whitehead* has set up in the owners of estates in *Little Sutton*. Upon the evidence
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there is this difference between the two cases. The tithes belonging to the rectory in *Great Sutton* have been sold to the purchasers of estates there. But it is in evidence that these tithes were collected before they were sold: that tithes of corn and grain only were received or even demanded by the rector; and the evidence to the tilth-penny is the same here as in *Little Sutton*. Under such circumstances, if the impropiator had taken upon himself to convey tithe of hay to the purchasers of the estates in *Great Sutton*, they could have taken nothing under the conveyance: but in this respect *Davis* is in the same case with *Whitehead*: he has offered no evidence of any such conveyance: therefore as the objection in the case of *Whitehead* applies to this defendant, he must be decreed likewise to account in the same manner. The defendant *Bateman* is occupier of a farm inclosed from the Waste of *Great Sutton* in 1735, and as I take it, now belonging to the *Cholmondeley* family, who as rectors are entitled to the tithes of corn and grain arising thereon. This defendant claims to be entitled to tithe of hay, hay-grass, and agistment, upon the same ground of enjoyment of these tithes by the grantee of the abbey, as has been insisted upon by the other defendants. This defendant had less to prove than the other defendant, for he is not incumbered with the proof of a purchase of the tithes from the grantee: but he fails totally in the proof which was necessary for him to make in common with the other defendants, namely, the fact of the enjoyment of this species of tithes by the grantee, and therefore he must stand or fall with them. And in this case there is no colour of objection to the plaintiff's title to recover, except the general objection of a defect of proof of an endowment; for the tilth-penny could not possibly be made to apply to this case of a new inclosure. Some stress was laid upon the words "tithe of hay" having crept into a mortgage made by some of the *Cholmondeley* family, which, it was said, brought this case within the principle of the case of *Fanshaw and Rotheram* before my Lord *Northington*. But it was satisfactorily answered at the bar, that the language of a mortgage-deed, not followed by possession or evidence of enjoyment, could in no case avail in the least, and that nothing could be more unlike the case of *Fanshaw and Rotheram*, where there was evidence of a long, uninterrupted possession and enjoyment under a series of family settlements: so that as to this defendant, he must account likewise with costs.

I come now to the case of the defendant *Maddock*, who defends separately.—He is an occupier of land in the township of *Whiby*,

1775. he has taken up the defence which two of the three last named defendants have rejected, I mean, the modus of a penny called the tilth-penny. He states, that in the township of *Whitby*, there is a modus of a penny called a tilth-penny in lieu of the tithe of hay for every ancient tenement payable by the occupier at *Easter*; and he states the lands in his occupation, consisting of five closes, to have been parcel of such ancient tenements as have immemorially paid a tilth-penny. There is some evidence on the part of the plaintiff to shew, that two of these closes, that is, *Mudwell* and *Long Croft*, were parcel of ancient tenements belonging to houses situate in that part of *Whitby* which is in the parish of *Stoke*; which *Maddock* admits are to pay tithe of hay in kind. But the weight of the evidence is, they are part of *Robinson's* and *Salmon's* two tenements, belonging to houses situate in that part of *Whitby* which is in the parish of *Eastham*. The case is therefore brought fairly to the point upon the modus, whether there is such a modus as the defendant has set up. One witness only, *Anne Charmley*, speaks to the tithe of hay in kind having been rendered to the vicar in *Whitby*; and that is a single instance only, viz. for the *Inn Jack*, part of *Edwards's* tenement: all the rest of the witnesses and several terriers agree, that no tithes in kind have ever been paid. The terriers say, *Whitby* is freed from the tithe of hay by the payment of a tilth-penny for every house. The witnesses say, that a tilth-penny was payable in lieu of the tithe of hay by the occupier of each farm house having lands holden therewith. One witness, *Robert Hayes*, in another part of his evidence, adds, that he understood the tilth-penny to extend to cover fields anciently belonging to ancient farm houses: his evidence goes to support the modus laid by the defendants for specifick lands. But he is not supported in his understanding of the modus by any of the other witnesses, and the whole tenor of the evidence is against it, and determines the payment of the tilth-penny to be for lands occupied with a house without specification more or less. *Critchley*, one of the witnesses, says, that the lands which formerly composed the tenements within those townships where the tilth-penny is paid, lie intermixed, having been taken from one farm and added to another, so that no body but one intimate with the whole town, or who has lived a long time therein, can give so perfect an account as could have been given when the tenements were holden separate. It is in proof, that *Maddock* and the other two defendants, *Whitehead* and *Davis*, held three or more tenements which the witnesses remember to have

been holden separately, for each of which when holden separately a tilth-penny was paid. And yet *Critchley* says expressly, that he collected one-penny and no more, as the tilth-penny from each of those defendants; plainly, because he considered the modus as payable for the lands holden with a farm-house indefinitely, and not for specifick lands. The same witness says, if a considerable part of the lands belonging to a farm-house were taken from it, and added to another farm; yet if any land besides a garden-spot was left and was mowed, he continued to collect the tilth-penny. This pursues the same idea of a payment for lands more or less. It is in proof that in all the townships there are houses which have now no lands belonging to them, but formerly had lands, and paid the tilth-penny. The decrease of houses having lands within the memory of the witnesses is stated. In *Whitby* they are decreased from 14 to 9; and *Critchley* says he collected only nine tilth-pennies. In *Great Sutton* they are also reduced from 14 to 9; in *Little Sutton* from 18 to 8: and no witness speaks of more than one tilth-penny paid by the occupiers of any of the consolidated tenements. An argument was drawn from the names of the tenements continuing the same for a great length of time: but those names did not appear to be of any antiquity; many of them being the names of the tenants whom the witnesses remembered to have first occupied them, and the preserving of the names of former occupiers is in great measure accounted for by the usage in the parish to rate to the church ley, as it is called, by tenements.

Upon the whole, therefore, there seems to be no doubt as to the fact of there having been a usage to pay a tilth-penny for every house having lands belonging to it, without specification or regard to quantity. There is as little doubt that this usage is different from that which is laid as a modus by the defendant *Maddock* for specifick lands composing an ancient tenement. Notwithstanding which, if the usage which is proved could be supported as a modus, we should not incline to decree an account. Not that the cases cited in prohibition stand in our way, (for in prohibition it is always a question of jurisdiction; and any thing that shews that the ecclesiastical court ought not have that jurisdiction is sufficient to refuse a consultation :) but, because the reasoning which weighed with us in the case of *Oxton v. Healing*, would also govern this case. This consideration makes it necessary to inquire into the legality of the modus proved. As to which it has never been contended, that such a modus could be supported. But the counsel for the
defendant

1775. defendant assuming against the clear result of the evidence, that the modus proved was for specifick lands, have argued that the severance does not destroy the modus; that it is not necessary that all should remain in one hand; that every man who holds a part is liable, as in the case of a rent-charge, and that it is sufficient that the vicar is not without his remedy. All which is very true, and would be to the purpose, if the modus were as they state it. But it being clearly otherwise, and being a recompence for a tithe wholly uncertain, fluctuating in its amount, shifting according to the changes in the occupation of lands, to be reduced to a single penny, if not to be wholly annihilated, it seems impossible to support it. This is so clear upon principles, I need not look for authorities. However, the case of *Turton v. Clayton*, of which there is a loose note in *Burb.* 80. seems to be in point. A hay-penny, say the court, is unreasonable, for if a man has 60 acres of hay, he pays only one-penny; and if he lets them to 60 several persons, they shall pay one-penny a piece. The converse of the proposition would have put the unreasonableness in a stronger light, and would be exactly the present case; that is, if 60 persons pay each one penny, and they let their land to one, one penny only shall be paid. And in fact this defendant, *Maddock*, appears in 18 years time to have consolidated so many tenements or parts of tenements in the township of *Whitby* as have increased his rent from 4l. to 170l. If this modus cannot be supported, there is nothing in the way of the account prayed by the bill against this defendant, and also against the other defendants *Whitehead*, *Bateman*, and *Davis*, who are occupiers of lands in those townships in which the usage of the tilth-penny has prevailed, against whom I have already stated there must be an account unless this modus can be supported. And therefore upon the whole the directions are, that the parties go to trial of the issue upon the modus set up by the defendants, *Oxton* and *Healing*, with liberty to indorse the posita as usual, and that there be an account decreed for tithe-hay in kind against *Whitehead*, *Bateman*, and *Davis*, with costs. As against the defendant *Maddock*, inasmuch as he has set up a defence as fairly as he could do to make a tolerable case to give him a chance of success upon a true ground of defence, that is, that no tithes in kind have been received; we think he had a good colour to make the defence he did, and as to him the decree ought not to be with costs. It is my duty to observe, though
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my Lord Chief Baron and my brothers have agreed with me in the decree we are to pronounce, I alone am answerable for, I am afraid, many errors and mistakes which may be found in the reasons which have been drawn up during the course of the sittings in a hurry; therefore I am bound to take them upon myself. You will try the issue at *Shrewsbury*.

The defendant *Oxton* and others on the 23d of *January* 1777, the defendant *Whitehead* being dead, petitioned for a re-hearing; and it was on the same day granted, upon the defendant's making the usual deposit.

The plaintiff revived the suit against the executors of *Whitehead*; and on the 16th day of *April* 1777, on the application of the executors, the original cause was also ordered to be reheard as to them.

The cause came on accordingly to be reheard; and upon hearing counsel several days, and reading the proofs and exhibits which had been read on the former hearing; and on reading, on behalf of the plaintiff, two terriers of the parish of *Eastham*, remaining in the consistory court of the bishop of *Chester*, the one of them taken in the year 1696, the other in 1709, and the following additional evidence on behalf of the defendants, that is to say, several depositions taken in the cause; an exhibit marked L. being by an order of the court to be produced at the rehearing, viz. "A table of tithes due in the parish of *Eastham*, accordingly as they have been formerly received by *William Seddon* and *George Beckett*, vicars of the parish of *Eastham*;" in which was the following clause, viz. "Easter dues in *Whitby* and the two *Suttons*; no hay; no tithe-calves; no mortuaries; only a penny a cow; and from every house a tilt-penny;" the cause was ordered to stand over; and on the 1st of *July* 1777, the judgement of the court was delivered.

Lord C. B. *Smythe*.—On the rehearing of this cause, it has been insisted, that the vicar's right to the tithe in question does not sufficiently appear; and that, in all cases, the vicar's right, if disputed, ought to be tried at law. MS.

There is no such rule in a court of equity that all disputed facts should be tried at law; where indeed there is a contrariety of evidence, and a doubt is created in the court, there, it ought to be tried by a jury. In the present case, it is proved, that the impropriators receive tithes of corn and grain only. If the impropriators demanded the tithe in question, it ought to be tried at law: that

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that was the case of *Carte v. Ball*. In this case the issue already directed must be tried. The tilt-penny is not insisted upon as a modus by the defendants who have reheard the cause. The tithing-table speaks of the tilt-penny as paid for hay, not as a modus. This cause is merely for a subtraction, not binding any right; and as I am satisfied with the vicar's right as proved, I think no issue ought to be directed to try it.

Eyre B. said, he had given his opinion fully before, and saw no reason to change it; and therefore declined giving his reasons.

Hotbam B. said, he was not present at the former decree, and therefore would give his opinion.—“ It has been said that the court of Exchequer has not an original jurisdiction in cases of tithes, but that it is only incidental and collateral as to discovery and account. But it is to be recollected that there is a marked distinction between the court of Chancery and the court of Exchequer. The court of Exchequer is a court of revenue, as well as a court of Equity, and, as a court of revenue, it had always an original jurisdiction over tithes. Tithes were always part of the possessions of the crown; and it is the peculiar duty of this court to protect such property as belongs to the crown. From the earliest reports or records of law, it appears that the court of Exchequer have uniformly exercised this power over tithes: and even were the point problematical, the constant practice of the court for so many centuries would now warrant the exercise of such immediate and absolute jurisdiction. This is merely a case of subtraction: the rector does not claim, nor ever seems to have claimed. In *Carte v. Ball* the rector actually claimed, and therefore it was proper to try the right by a jury. A modus is often allowed without a trial; and yet in a case of subtraction, that is a decree on the right. It is objected that the vicar has not stated his evidence. It is not necessary to state it. The question then is only, whether it shall be tried at law. As to *Oxton* and *Healing* an issue is directed; and in such a bill as this, I think it not necessary to try the right of the vicar. It appears to me sufficiently from the evidence in this cause, that the impropriators have not received tithe of hay, and that the vicar has. *Lloyd v. Mortimer* proves, that payment of tithe in one part of the parish is evidence of right to it in another. There is no doubt that the tilt-penny is paid for hay; the natural construction of the tithing table is, that the tilt-penny is paid for hay. I think the decree ought not to be varied in part.”

Supra.

Perry

Perryn B. having been counsel in the cause for the defendants declined giving any opinion.

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The court therefore ordered the decree to be affirmed.

From these decrees the defendants appealed to the House of Lords, for the following (among other) reasons :

1. That although a rector, whether lay or appropriate, is entitled to tithes of common right, and, on a bill brought by him for tithes, has nothing more to prove than that he is rector ; and it is incumbent on the defendant to prove an exemption or discharge, or a title to the tithes ; yet the case of a vicar is totally different, and it is as clear and settled a rule, that when there is a rector, *prima facie* all the tithes in the parish belong to him, as that in order to support a bill by a vicar for tithes in kind, he must prove his right to such tithes, which must be either by shewing an actual endowment, or by prescription or usage.

2. That the respondent in this case has not produced or proved any actual endowment of the vicarage, nor has he given any evidence of the taking or receipt of any tithe-hay in kind, in the said townships of *Great or Little Sutton*, by any of his predecessors ; but the only evidence on which he founds his claim to the tithe of hay from the appellants several farms, is, the payment of the said penny, called, a tilt-penny, which some witnesses (who are all common country people) for the respondent have said, they were informed or they believed was paid for tithe-hay, but in a very vague and partial way (often observable in depositions), and without giving any reasons for such belief, or saying how or by whom they were so informed, and so as not to be admitted as legal evidence ; that by such sort of oral testimony, the respondent endeavours at this day, after an immemorial enjoyment to the contrary, to apply the tilt-penny, as a payment for tithe, and yet in a manner not to be good as a modus, but still as evidence to supply the want of endowment and enjoyment, and by such means to come at the tithe-hay in kind from the appellants farms, though it appears by the tithe table, which was in the respondent's power, that the tilt-penny was from every house ; and the respondent not having alleged or charged any thing in his bill relating to the said tilt-penny in any manner, it was impossible for the appellants to give any answer to such his evidence, or to examine any witnesses to contradict it, or to cross examine the witnesses produced by him, or to say any thing relating thereto. And the evidence produced and read by the respondent in support of his claim, and relating to the tilt-penny

1775. penny, was much too loose and inconclusive for a court of Equity to make a decree in favour of the respondent, a vicar, in the first instance, for payment of a tithe in kind, against common right, and which neither he, nor any of his predecessors, had ever before taken, enjoyed, or claimed, and particularly so, as no evidence ought to have been suffered to have been read to matters, which were not charged or alleged by the bill, or in issue between the parties in the cause.

3. That the claim to tithes is, in its nature, a legal claim, and the right to tithes a legal right; and in the case of a bill filed in a court of Equity by the respondent, a vicar, for the payment of tithes in kind, and the vicar's right to the said tithes being denied by the defendant's answer, and the evidence proving that he never had enjoyed or received the tithes demanded, and he having given no clear evidence of his right thereto, it is submitted by the appellants, that a court of Equity (which has no original jurisdiction in matters of tithe, but gives relief in consequence of the account prayed) ought not, in the first instance, to have decreed in favour of the respondent, and thereby (in effect) established his right; but ought either to have left him to his remedy at law for the recovery of the tithe of hay, or have directed an issue to try whether the respondent, as vicar of *Eastham*, was or was not endowed of the tithe of hay; upon which issue, and a *viva voce* examination of the witnesses, the question would certainly be better and more fully discussed and decided, than it could be by the court of Exchequer upon the depositions; and when the most material part of the evidence was taken and received, it was impossible, as before mentioned, for the appellants to give it any answer.

4. That, besides the aforesaid reasons, it is an additional objection to the decree, as to the relief given against the appellant, *Elizabeth Bateman*, that the farm occupied by her has not been inclosed from the waste above forty years; and therefore there could be no pretence that the penny called the tilt-penny was in respect of that, and, consequently, no satisfaction whatsoever could be pretended to have been ever paid in lieu of tithe-hay of that farm, and the respondent had no evidence in support of his right to the tithe-hay arising thereon.

5. That it is certain, that the appellants and the former occupiers or owners of their farms, have, from time immemorial, invariably taken and enjoyed the hay arising therefrom for their own use, without paying any tithe thereof; and it never was conceived

conceived by any of them that they paid any satisfaction for the same; and therefore the appellants humbly insist, that, in favour of such long enjoyment, a grant of such tithe-hay ought to be presumed by every court of justice to have been made by the person or persons capable of making the same.

6. That for the reasons aforesaid, and as the claim to the tithe of hay in kind, made by the respondent, was never made by any former vicar of the parish, nor by him until several years after he became vicar thereof; and as the appellants did no more than defend what they apprehend they have a legal right to, and preserve the ancient usage in the parish; they humbly apprehend that the court of Exchequer ought not to have decreed them to pay the respondent the costs of the suit.

On the other hand the plaintiff, in affirmance of the decrees, urged the following (among other) reasons:

1. Because the defence of the several appellants stands clearly falsified in every material point, the executors of the late *William Whitehead*, in particular, being now presenting this appeal in direct opposition to an act of parliament, which makes it impossible that the defence of their testator could be true.

2. Because the tilt-penny modus, proved in the cause, was objected to in the court below, on the ground of law, and not of fact; and therefore was ripe for the judgement of the court.

3. Because no length of time can give sanction to a bad modus.

4. Because an appeal, like the present, following two hearings, in the court below, of ten days continuance, and two unanimous decrees in that court, after six months mature deliberation, in favour of the respondent, seems (not so much to bespeak the efforts of parties presuming themselves injured, and seeking redress, as) to betray the determined purpose of a powerful combination, proved in the cause, to harass, and, if possible, to destroy an unsupported individual.

On the 26th of *January 1779*, after the arguments of counsel had been heard at the bar of the House, Lord *Mansfield* spoke as follows:

“ My Lords, This question has taken up some days of your Lordships’ time. It takes its rise from a bill filed in the court of Exchequer by the respondent, who is vicar of the parish of *East-ham*, against the occupiers of land in that parish; and in that bill he states, that he is endowed of tithe of hay and small tithes throughout the parish. He states that these tithes have been subtracted, some

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some by some occupiers, and others by other occupiers: that some of the occupiers have subtracted the tithe of hay for one year, and others, who are not now before this House, have subtracted the payment of small tithes for one year; and he prays an account, and payment of such tithes, your Lordships will observe for one year only. He does not suggest that there is any question of right whatever: he does not suggest that there is any dispute upon a question of right: he does not suggest that any modus is pretended: he does not make the impropriator a party; but brings his bill upon a clear case of endowment only for non-payment of tithes of hay in kind, and that for one year only; so that it comes into the equity side of the court of Exchequer for consequential relief, on a clear legal right, which is to discover the quantity and value of the tithes so subtracted, and to obtain the payment of them. To this bill the defendants answer. They say, he is not endowed of tithe of hay, but that tithe of hay belongs to the impropriator; that they have purchased, as to their own lands, the tithes of hay in *Great and Little Sutton*; that they purchased them from the impropriator, they having been immemorially enjoyed with the lands; and that is the way in which they claim to have purchased them. They say, that a modus of a penny a house is paid. This is awkwardly stated in the answer, but they believe a penny a house is paid (called the tilt-penny) for all small tithes not paid in kind.

Upon these pleadings the parties go to proof. In their examination the appellants do not prove that they have purchased the tithe-hay of the impropriator, otherwise than as they have purchased the lands in *Great and Little Sutton*, (all which townships were in the abbot of *Chester* the appropriator), and that the lands are free from tithe-hay by immemorial enjoyment therewith. And that is the way they say they have purchased these tithes; in no other sense have they purchased them. As to this penny payment, they prove nothing as to its being a pension; they prove nothing as to its ever being paid as a modus or composition for small tithes; they give a sort of evidence as if the impropriator at least claimed the tithe of hay, because they produce from the beginning of 1690, odd, a series of mortgages, in which tithe of hay is alleged as a part of the security. But it comes out in the proof without contradiction, that beyond the memory of man or writing no tithe of hay was paid to the vicar from the hamlets of *Great and Little Sutton*; and it comes out by an exhibit made above a hundred years

ago,

ago, because it is a table of the payment of tithes and vicars dues in the time of the two vicars mentioned; the first was vicar in 1637, the last in 1667, and he died in 1692 or 1693; therefore it is near a hundred years ago since the time of his death; there, the memorial is, "No tithe-hay is paid." This comes out in evidence. But the plaintiff, the vicar, has examined many witnesses, and produces many exhibits, by which he thinks this proposition is manifest; that the manner of paying the tithes in these townships was by paying a penny a house called, the tilt-penny, as for hay only; that this manner of payment was such as by law never had a legal existence, because it is unreasonable, and never could arise from any contract; that having been erroneously paid, though it might be paid by voluntary agreement, yet, unless it is such as may be presumed to have had a legal beginning, it does not bind beyond that consent: therefore he contends that by his evidence he has proved that this was the mode of paying the tithe of hay; that by law it cannot be supported as a modus; therefore it must have been by agreement, and the consequence is, that he must have been endowed of the tithe of hay in kind, or he could not have received this modus, which he so contends was for hay.

Upon the hearing of the cause the court of Exchequer are of opinion, and they decree, the vicar an account of the tithe of hay; and in that decree they virtually determine these points: they determine, that in fact it was sufficiently proved to their satisfaction, that the manner of paying tithe of hay in these townships was by a penny a house: they determine, if the fact was so, that that payment never could have a legal beginning, and therefore was void in law: they determine, that though it was erroneous and void, it presumes the endowment of tithe-hay as much as the payment of tithe-hay in kind could have done: because the impropriator could only give the tithe to the vicar; therefore they have holden, that that payment proved the endowment; they have holden farther, that in proving such an endowment (though the case of a vicar is very different from that of a rector) by law he was entitled to the tithe of hay in kind, as in the case of a rector. The defendants contended on the bill, as they do now on their appeal, that the court ought not to have made that decree without having the right of the vicar legally tried; that the cause ought to be sent to a jury on the right of the vicar. The court were of a different opinion, and upon the hearing, and at the re-hearing, they unani-

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says has weight on that question, that where a modus is *set up* in an answer to a bill brought by a vicar, and that modus is condemned on the face of it, the vicar has a right to the tithes in kind, because it is evidence of the endowment of the tithes. Who is to have them? they cannot go to the rector, he has given up all right to them. Who is to have them, but the vicar? Therefore I am not inclined to differ from the court of Exchequer on that point, because it would be attended with bad consequences in all bad moduses, that *are so pleaded*.

There is another ground on which the defendants contend there should be a trial at law, that is, with regard to the fact itself, whether this penny has been paid and received as a manner of paying tithes of hay. There are many arguments which seem to have very great weight, and deserve your Lordships serious consideration, whether that ought not to be tried, and whether a court of equity has a right to decree upon depositions. I must just sum them up to your Lordships.

The first is, the nature of the claim. It is a claim against immemorial possession and enjoyment, and it is to overturn property which people have thought themselves secure in now beyond all memory of writing or man. That is a very unfavourable claim, and a claim that every court of justice would greatly discountenance. It is a right, a legal right; and a court of Equity cannot set aside or decide as to the consequences of that legal right; to determine a right against constant possession,—to determine a right against constant usage, against constant enjoyment. There is nothing courts of justice cannot presume in favour of possession. Possession is every thing;—estates are bought by it.—Such a claim is always reprobated.—But here, a court of Equity, on a question arising on a legal right, proceed in the first instance to determine it, and make a decree.

There is another right which they go upon for the respondent, which is the medium by which he endeavours to shake what has been quiet for centuries, that is, a penny has been paid for every house and for hay. Yet it is immemorial usage. The written testimony is rather dark and wants clearness, as to the nature of the practice upon it, arising from what witnesses say, whose testimony is never taken down in written depositions, as it is in evidence in open court *viva voce*. But if there is any thing uncertain in matters of right, it is of course to be tried by a court of common law; and in a variety of cases where it is on such a right, the counsel do not read their briefs, there must be an issue of course.

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I now proceed to consider the nature of the evidence. It is not because the weight of the evidence is on one side or the other, that the right is to be determined by a court of Equity. I know no case where a court of Equity decree on a right that they do not go on this ground, that it is clear *beyond contradiction and without a possibility of its being otherwise*. But there is a leaning in all juries to determine against tithes: therefore there are many precedents, where upon the evidence coming home quite clear upon a modus set up or a right, a decree has been made without sending it to a jury.

I shall now consider what objections have been made to this evidence. In the first place as to the negative evidence, that the impropiator has not now the tithes, I think it by no means proves it; it is very equivocal, for the impropiator was the owner of all the lands in *Great and Little Sutton*: no tithe-hay has ever been paid; none, because the lessees and purchasers occupied it themselves with the lands. It is to be supposed, that when he lets them to his tenants, the impropiator lets them tithe-free at greater fines or rents; therefore it does not follow but that originally tithe-hay might have been paid in kind to the impropiator. The arguments from the parliamentary survey do not at all conclude by any means, and therefore that is not decisive to prove, that they did not pay such tithes. The next thing is upon the nature of this payment. They say for the respondent, a modus is paid by every house for hay. It is a very extraordinary payment, very difficult to conceive. What, a penny a house for hay! Is hay made in the house, my Lords, or spent in the house? A smoke-penny, or a hearth-penny for a house is very natural and well understood, my Lords. Now what says the written evidence? there is not one piece of it that states what the modus is for. The table of fees and the two terriers are produced. What is the fact? why expressly, that no tithe of hay is paid. The fact is, a penny is paid, but for every house; for what else the penny is paid, or if for any land, or on what account, they do not say. But the terriers, which is very remarkable, of 1696 and 1707, say free of tithe-hay; but a penny is paid for every house, and then they say (at that time) "on what account we know not." It is paid by every house, but they pay not hay; what is covered by the penny we cannot tell. And next comes the parol evidence. And here some of the witnesses say, it was paid for land occupied with the house, were that land more or less, and if there is no land, the penny is not to be paid. Others say, it was paid for ancient tenements, and the land anciently

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ciently occupied with those tenements. But there is no certainty from this testimony ; and there are other circumstances, my Lords, that weigh a great deal. It is argued, that the appellants were rather surprized (though I do not think they were) as to the house-penny being reputed to be due in lieu of some tithes. I believe they were apprized of it, and were aware that they could not support it, if set up as a modus, and therefore did not set it up as a modus ; for one of the defendants *Maddocks* as to *Whitby*, did plead it as a modus, and a witness says, that *Whitehead* said, it was paid for tithe-hay. I do not therefore think the appellants were surprized in that ; but I do think they were surprized as to the nature of the claim, and what the vicar meant to offer as proof of the endowment. They plead no modus, therefore they had no need to prove a modus : the vicar stated no modus, therefore they had no need to plead or prove a modus ; and there they were well advised. The vicar comes here to set up a modus to make use of it as evidence of his endowment, and then in his own way to knock it on the head by such his own proof, as illegal, and so to let himself into the tithes in-kind. There never existed a case, I believe, in the whole practice of the law of just such a ground so proved. I do not believe, my Lords, any one remembers a vicar coming to set up a modus, and then damn it, as not being a legal modus, and thence draw an argument of his right to tithes in kind. There was a stronger case before Lord *Hardwicke* where he decreed on an endowment. It is the case of *Carte*, whose name is very well known as an historian. There was a bad modus paid : after his brother's death he brought a bill for the tithes in kind : he had gotten the abbot of *Lyra* to furnish him with the endowment. The occupiers set up a contributory payment to the amount of the modus paid out of the lands : one paid 5 s., another 6 s., and so on, filling up the sum : they pleaded that as a modus for all tithes. But upon the evidence my Lord *Hardwicke* doubted whether it was sufficiently proved to have been paid as a modus, and that it might be a pension ; and therefore he said, he must prove an endowment ; and he directed this issue, whether the vicar was endowed of the tithes claimed by the bill. The fate of it was, that he was not endowed. That was a stronger case than the present, because they had agreed in the modus.

Now at the bar, and in the court below, no distinction has been made, as to the nature of the issue to be directed, if an issue is to be

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directed; but it is taken for granted, that it must be on the right of the vicar, whether or no he was endowed. I own I have had great difficulty about it, because I think directing the issue in that form is leaving that to the jury as a matter of fact; if tithes in kind have in any manner *eo nomine*, if they have been paid in any manner, though illegally, it is equally evidence of the right to the tithes, and the necessary consequence in point of law, I should think, is that the vicar must have the tithes in kind, if the modus is set aside. Leaving that to the jury, every jurymen may say, the evidence before me is a payment of money; I cannot say whether he is endowed of tithes in kind, I know nothing of the legal consequence. The fact in point of appeal here is what the jury are not warranted to pay the least regard to; the case for them to try is, whether the vicar is endowed of the tithe of hay. If there should be a trial on this part of the case, I am not struck with the consequence of it, that it might shake all those cases which are established in the courts of equity, that if a vicar has a modus set up against him, that of course there must be an endowment of the tithes in kind to the vicar, after the modus is condemned, that they should direct an issue to know whether he was endowed of it, or no; and the counsel say, the practice is so, and here no modus is pleaded by the appellants. In my own mind, I think what will maintain the justice of the case is, to direct an issue upon the very fact. *Ex facto oritur jus*; if the fact is determined, the law follows of course; an inquiry being directed on the fact, the fact necessarily involves the law. Courts of justice direct issues for their own conscience to apply it to the fact of the case. What I propose to your Lordships therefore is, to direct an issue to be tried between the parties, whether the tilt-penny paid by the occupiers of houses, with ⁱⁿ the townships of *Great and Little Sutton*, to the vicar of the parish of *Eastham* has been paid as a modus and composition in lieu of tithe-hay, with liberty to indorse the *posse*. Your Lordships see in these facts, the respondent is to prove the affirmative: the appellants can prove that this is a pension, the issue will be with them: if they can prove the money applied to a modus as for small tithes, the issue will be with them. The great objection to the issue is, it is to set aside a modus, and the occupiers have not stated the modus. How was it paid, and for what, is the question. The jury may inquire into the facts, and they will then see, whether it is a good or a bad modus; if a good modus, the vicar will not have a right

a right to tithes in kind; if it is a bad modus, he will have a right. I therefore propose to your Lordships, that the court of Exchequer direct a trial at law in the county of *Chester* upon the following issue, "Whether the tilt-penny paid by the occupiers of the houses within the townships of *Great* and *Little Sutton* to the vicar of the parish of *Eastham*, has been paid as a modus or composition in lieu of tithe-hay, with liberty to indorse the *placet*, reserving all further consideration in the case for an after time."

It was therefore ordered, that the decree of the court of Exchequer be reversed; and the above issue was directed to be tried at the next summer assizes for the county of *Salop*, instead of the county of *Chester*.

The issue was accordingly tried at *Shrewsbury* at the following summer assizes, when the jury, which was special, found, that the tilt-penny had been paid to and accepted by the vicar in the very words of the issue. The other issue as to the modus of 40 s. a year payable by *Oxton* and *Healing* in lieu of the small tithes of the demesne lands of *Netherpoole* was likewise tried at the same assizes, and a verdict was found in favour of the modus.

A new trial was moved for on the issue respecting the tilt-penny modus and refused; and on 25th Nov. 1779, the cause came on to be heard on the equity reserved, when the court ordered the defendants *Oxton* and *Healing* to pay the arrears of the modus of 40 s. found by the verdict; and on their undertaking to do so, the bill to be dismissed as against them, without costs either at law or in equity: and they further ordered an account to be taken of what was due from the defendants, *Whitehead*, *Davis*, and *Bateman*, respectively for the tithes in kind of hay demanded by the bill, and that the said several defendants should pay what should be reported due to the plaintiff on account thereof, together with his costs both at law and in equity with respect to the tithe of hay.

N. B. When this cause first came on in the court of Exchequer, MS. the defendant's counsel objected that there was a want of proper parties, none of the land-owners, except the defendant *W. Whitehead*, a land owner as to part of the tenements in his occupation, nor the impropiator being parties to the suit; and that the vicar's right being denied, they ought to have been parties: and in support of this objection the case of *Hosper v. Lethbridge*, *Bunb.* 291. and *supra* 702. was cited. But the court over-ruled the objection; in which opinion *Eyre B.* states, that he agreed singly on the ground of inconvenience. I took it, says he, that though there was no

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strict objection for want of parties, but the court could make a decree between these parties; yet that the court, if they saw upon the opening or on the suggestion of the defendants, that other parties claimed an interest in the same thing, and that there might be further litigation, did frequently order the cause to stand over, and those parties to be added: that the case in *Bunbury* seemed of that sort: that this being in the discretion of the court, they would consider the convenience and the inconvenience: considered upon the ground of inconvenience and expence, the number of parties to be added, the probabilities of abatements, the connection of the defendants with the parties supposed to be interested, it would be unfit to do it in this case.

M. 16 Geo. III. A. D. 1775.

White v. Friend.

THE rector of *Little Mongham*, in the county of *Kent*, claimed all tithes and oblations arising therein.

The defendant *Wyburn* said, that he had regularly every year set out his tithes, and that they had as regularly been carried away by the defendant *Friend*, but by what right he claimed the same he knew not.

The defendant *Friend* said, that during the year 1773 he occupied lands in the parish as tenant to sir *N. Daeth* Bart.; that sir *N. Daeth* held the said lands, with divers other lands and premises in the said parish, by lease dated the twenty-first of June 1771 from the archbishop of *Canterbury* to his father; that all the said premises were formerly part of the possessions of the monastery of *Saint Austin* in or near the city of *Canterbury*, one of the greater monasteries; that the said lands, on the dissolution thereof, were seized into the hands of *H. 8.* and were afterwards by him granted to *Thomas* then archbishop of *Canterbury*, and his successors; that they were holden by the monastery, before the dissolution thereof, freed and exempted from the payment of tithes; that by 31 *H. c. 13.* the said lands were discharged from the payment of tithes as freely and in as large and ample manner as the said monastery had holden and enjoyed the same; and that he had good right, power and authority to hold and enjoy the same, in like manner, exempt and free from payment of tithes to the plaintiff or any other person whomsoever.

whomsoever. He admitted, that he had taken all the tithes which had accrued in the said year for the said lands in the occupation of the defendant *Wyburn*, which, he contended, he was well entitled to do, they having been for many years past received by *sir N. Daeth* or his ancestors: and he insisted, that if the plaintiff sought a satisfaction for the said tithes, *sir N. Daeth* ought to be a party to this suit.

The plaintiff replied; the defendants rejoined; and witnesses were examined on the part of the defendant; and the cause came on to be heard on the 12th of *December 1775*; when the defendant's counsel objected to the plaintiff's proceeding for want of proper parties.

Upon this occasion *Eyre B.* said, that in this case, the want of parties was not strictly an objection; but that, if it was *convenient*, the court would order parties to be added: that he inclined to direct the cause to stand over with liberty to amend, by adding parties without costs.

Hotham B. said, it was *useful* that the cause should stand over in such a case, for the purpose of making a final end.

The plaintiff accordingly amended his bill, making *Sir N. Daeth* and the *Archbishop of Canterbury* defendants (u).

(u) [*In Baron Eyre's notes the following memorandum is subjoined to this case.*]

N. B. The next morning *Mr. Kenyon* told me, that the draughtsmen were apprehensive of being involved in difficulties by our order, directing the bill to be amended by adding parties. But I think not. They will make the usual parties in the first instance: if it appears afterwards by the answer, that other parties are necessary or convenient to be added, that will be a sufficient guide.

Mr. Kenyon objected, that the witnesses must be all examined over again: but that can never be necessary if they move to amend in time, on the coming in of the answer: and if not, the court will always weigh the comparative conveniences and inconveniences.

Qu. On farther consideration, if the parties were not strictly *necessary*: for the defendant set up a title derived from one of the parties.

In another case on the motion of *Maddox*, it was said, that it would be an objection for want of parties, not to make the person in whom the title was a party.

P. 16 Geo. III. A. D. 1776. B. R.

Wilkinson, qui tam versus Allot. [Cowp. 429.]

The want
of a parso-
nage house,
is no excuse
for the in-
cumbent's
residing out
of the pa-
rish.

IN debt upon the statute of 21 H. 8. c. 13. for non-residence, upon *nil debet* pleaded, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

That the defendant *Bryan Allot*, clerk, was presented, instituted, and inducted to the rectory of *Burnham St. Mary's*, otherwise *Burnham Westgate* and *Uple*, in the county of *Norfolk*, in the year 1766, of the value of 300*l.* *per annum*: that he had first a lodging, and afterwards a ready-furnished house in the said parish, until *Michaelmas* now last past, which he then quitted. That, from time immemorial, there was not, nor is there any parsonage house upon the living. That under these circumstances, the defendant absented himself from all residence on the said living, and from every parochial duty, from the 28th day of *April* 1775, to the 28th day of *December* now last past, (being eight months), without any other legal excuse; and did not, during the said eight months, reside in or near the said living: but during all that time appointed a proper and sufficient curate or curates for all parochial duty of the said defendant's church or churches belonging to the said living, which curate or curates were resident upon the said living.

The question reserved was, "Whether under all these circumstances, the said defendant shall be deemed guilty of wilful absence and non-residence, and subject to the penalties of the statute 21 H. 8. c. 13?"

Mr. *King* for the plaintiff was beginning to argue, but Lord *Mansfield* called upon the counsel for the defendant to go on.

Mr. *Partridge*, for the defendant, recited the preamble of the stat. 21 H. 8. c. 13. and also the 26th section, whence he argued, it was apparent that the objects of the statute were of three kinds. 1st, That the cure should be duly and regularly served. 2dly, That hospitality should be maintained. 3dly, That the parsonage house should be upholden and preserved in a condition for the incumbent to live in. That these requisites had been complied with by the defendant, as far as lay in his power. As to the two first, it was expressly stated in the case, that there was sufficient curate for all the parochial duty, &c. actually resident

upon

upon the living. In respect of the last, it was impossible in this case for the defendant to comply with it; because, from time immemorial there never had been any parsonage house in the parish. It would be absurd, therefore, to talk of residence for the purpose of repairs, where there was no house to repair. The cases upon this statute are very few. 6 Co. 21 b. *Goodale v. Butler*, Cro. El. 590. and *Goldsbor.* 169. S. C. The words in 6 Co. are express to the point. "It was agreed, that lawful imprisonment without covin, is a good excuse for non-residency; so, if there be not any parsonage house." These cases are excepted out of the act by construction of law. In *Law v. Ibbetson*, East. 11 Geo. 3. R. B. Lord Mansfield said, "this case is extremely clear; because the defendant has absented himself from his parsonage house without any excuse, and therefore is certainly within the meaning of the act. It has been determined, that if a parson lives in his parish, and lets his parsonage house, reserving a chamber to himself, he is yet subject to the penalty: so, if he keeps his house in repair, and servants constantly live in it, he himself residing elsewhere; for the residence must be in the identical house, therefore, residence in the parish, even in a house of his own, is no excuse. But if there is no parsonage house, he is excused altogether; for upon a penal act, he cannot be prosecuted for residing when there is no house to reside in." Here, it is expressly found, that there never has been any parsonage house: therefore, the defendant is excused; and he prayed judgement accordingly.

Lord Mansfield. The statute of non-residence is a beneficial law; and, though a penal one, has received a strict construction against such as have offended.

A clergyman with cure of souls is bound, not only by the canon law, but in conscience, to attend his duty in person if he can. By experience it was found, that neither conscience nor canon law were sufficient to bind the clergy to a due observance of their parochial duty; but they left it to be done by poor curates hired at small salaries. It would be a strange argument to say, that persons of that description could possibly maintain the hospitality which the statute had in view, and which ought to be kept up.

The stat. 21 H. 8. c. 13. was made to remedy this grievance, and the words are general; "that every spiritual person, &c. shall reside in, at, and upon his benefice:" it does not say in, at, and upon his parsonage house. The word benefice was indeed formerly

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merly used, to denote certain portions of land given by lords to their followers for their maintenance; but now it is a general term for any ecclesiastical living or preferment. In this case the benefice is a parsonage or vicarage, and the general words used by the act might be satisfied by his residing any where upon the living. However, authorities as far back as the time of *Elizabeth* say, that that construction does not answer the end; but it must be a residence in the parsonage house. It is a remedial and beneficial law both for the parish and the successor; and cases have been determined, where, though the parson lived within twenty yards of the parsonage house, and though he had a servant who slept in it, yet it was holden not to be a legal and sufficient residence.

It is true, the law says, that in all restrictions imposed, impossibility is an excuse; but then it must be performed *cy pres*. If there has been no parsonage house from time immemorial, it is most certain that the parson cannot live in it. What then? The next thing to be done is, to come as near to it as he can: he must live somewhere in the parish. His conscience obliges him to do so: the canon law requires it, and this statute enforces the obligation under a penalty. It is said that in *Law v. Ibbelton*, I did say, "that if there was no parsonage house, the parson might reside where he pleased;" but it is clear that must mean somewhere in the parish. Any other construction would be a shameful evasion of the statute. Here, there is no parsonage house; but the want of a parsonage house is no excuse for residing out of the parish entirely; and therefore there must be judgement for the plaintiff.

Aston and Willes justices concurred.

Judgement for the plaintiff.

P. 16 Geo. III. A. D. 1776. Scac.

Jones v. Pawlett.

Qu. If the defendant is bound to set forth the value and quantity of the tithes, where he sets up an exemption.

THE defendant set up an exemption.

The *Lord C. Baron* said, that if an exemption from payment of tithes is set up by a defendant, he is not bound to set forth the value and quantity of the tithes; but that in case of a modus, the value and quantity must be set forth.

Perryn B. remembered a case of a bill brought by a vicar: the defendant in his answer insisted, that the rector was entitled to the tithes in question; and the court of Exchequer determined, that

he was not bound to set forth the quantity and value ; though he seemed to doubt of the case of an exemption mentioned by the Chief Baron.

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But, in the present case, an exception to the answer had before been heard and allowed ; and the same exception was now heard again ; and therefore the court thought, that, in all events, the defendant was now bound to answer to that exception ; but they thought the answer sufficient and over-ruled the exception.

H. 17 Geo. III. A. D. 1777. Scac.

Robinson v. Appleton. [MS.]

BILL for tithes.—The defendant set forth a real composition made before the time of queen *Eliz.* between the parson, patron, ordinary, and occupiers, by which an acre was agreed to be paid in lieu of tithe-hay on the lands through the district of *Disforth* in the parish of *Topcliffe* in *Yorkshire*. All the evidence in the cause as far as it went tended to prove a modus.

Evidence of a modus will not support the allegation of a real composition.

The court were of opinion, that though in case of a real composition it is not necessary to produce the deed of composition, yet there must be evidence tending to shew that such a deed had been executed ; whereas the evidence in this cause went to shew a prescriptive payment or modus, which ought not to be confounded with a real composition. Decree for an account of tithes in kind.

Smith v. Goddard at *Serjeants Inn Hall*, sittings after *Michaelmas* term 1777, same point determined.

M. 18 Geo. III. A. D. 1777.

John Bosworth v. Joseph Limbrick the younger, Joseph Cullimore, and John Stock.

THE plaintiff, as rector of the parish of *Tortworth*, in the county of *Gloucester*, filed his bill against the defendants, stating, That the defendant *Limbrick* had ever since 5th *April* 1773 occupied lands in the said parish, and kept thereon a considerable number of milch cows, which yielded great quantities of milk : that the defendant *Cullimore* had ever since 1st *January* 1773 occupied lands in the said parish, and kept several milch cows thereon, which also yielded great quantities of milk ;

1777. milk; that the defendant *Cullimore* mowed a close called *The Lagger* in *Tortworth* in 1772, and dug potatoes in the said parish; and that both the last defendants had several other tithable matters during the time aforesaid in the said parish, the tithes of which were due to the plaintiff, but never set out for him: that the defendant *Cullimore*, his wife, and three or more children, of the age of sixteen years and upwards, living with him, had resided ever since 5th *May* 1772 in the said parish, and that there was due from them to the plaintiff *Easter* offerings, at the rate of two-pence an head, for two years past.

The plaintiff charged by his bill, that he was entitled to, and ought to receive, the whole milk milked on every tenth natural day, as well in the morning as in the evening, as and for the tithe of the milk of the cows, for the whole nine preceding natural days, which the plaintiff submitted to be the fair and equitable way of setting out tithe-milk in kind; and he insisted, that if the tithes of the milk of the whole herd of cows was to be set out at every tenth milking only, the owner of such cows would claim (contrary to natural justice) an option to set out the tithe, either at a morning's milking, or at an evening's milking, as he pleased, and would then set out the evening's milking for tithe, whereby the plaintiff would be much injured in not receiving his full tithe of milk; for that by the usual way of milking cows, the quantity and value of the milk of every cow milked in the afternoon or evening, was on an average one third less in quantity, and, consequently, in value, than the milk milked from the same cows in the morning of the same day, which was occasioned partly by the great inequality of the times between milking, and partly by the cattle not feeding so much in the day as they do in the night, by reason of the heat of weather, flies, and other causes; and he conceived, as the law gave him (as rector) the full tenth, and not any thing less than the tenth of the milk milked, an evening's meal, as and for the tithe, would be unfair, being so much less in quantity and value than the full tenth of the milk of such cows produced by the ten several milkings; and that therefore the only way for a parson entitled to the tithe of milk, to receive a full tenth thereof, was, that the milk milked on the tenth natural day, in the morning and evening, should be set out for the tithe of such milk.

He charged, that the parish of *Tortworth* was a dairy parish, appropriated wholly to the keeping of milch cows and making butter and cheese, there not being in the whole parish above three acres
of

of arable land (except the glebe) inasmuch that the tithe of milk is the best and most valuable species of tithe belonging to the said rectory; and as the whole tenth part of the milk, and not any thing less than the tenth, (with the tithes of the other tithable matters arising in the said parish, which are, comparatively, but small) was given to the rector for the maintenance of himself and family, he submitted it to the court, that the setting out for tithe the milk milked on the evening of every fifth day only, would be prejudicial not only to the plaintiff, in diminishing the revenue of his rectory, but also to the patron thereof, by lessening the value of the advowson.

And he further charged, that whenever the said defendants had set out the tithe of any milk in kind, they had always set it out in an evening, and never in a morning, or on the tenth natural day, as they ought to have done. He also charged, that the computation of time, when the milk of every person's cows that have calved should first begin to be tithable in every succeeding year, was, or ought to be, from the time when the first cow, after calving, in any new year, was brought to the pail and milked, the same being a new increase or renovation of the milk; and so, of every cow calving after such before-mentioned cow, the tithe ought to be set out on the same natural day and time, as that of the first cow in each succeeding year was, or ought to be, when first brought to the pail and milked after calving; and that the defendants, though their herds of cows were in the fall of each year dry, and yielded little or no milk, yet, in order to effectuate the design of making all the milch cows of the whole parish perpetually tithable on one and the same natural day in every year, pretended throughout the year, on every tenth milking, to squeeze or press a very small quantity of milk out of the whole herd, and to set out the same as and for the tithe-milk of such cows; but the plaintiff insisted, that, in every succeeding year, the tithing-day of milk ought to be computed from the time when the first cow after calving comes to the pail to be milked in each year, and that the tithing-days of the whole herd of cows ought to be governed and calculated from the first day when such first cow, after calving, in every year, comes to the pail to be milked, and not by the unfair practice of milking a few cows which are in effect dry, as being then big with calf, and never milked, unless for such unfair purposes, in order to keep up a succession of tithing-days throughout the year, and to make the tithing-day from year to year to fall

on

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This allegation was
fully proved.

on one and the same natural day throughout the parish, intending thereby to injure and distress the parson, by constraining him to collect the tithes of the milk of the whole parish at one and the same milking: that although the defendants pretended, that they had fully and duly set out the tenth meal of their whole herd of cows, as and for the tithe of milk, yet the plaintiff charged the contrary to be true, and that he was entitled to the tenth natural day's milk of all the said cows, and not to the tenth evening's milk only; and that the evening's meals, which they pretended to set out, had been considerably less than they ought to have been, occasioned by the unequal space of time of milking in the morning and evening of those days, when the tithe had been pretended to be set out; for that such space of time between the morning and evening's milking was always longer on the days which were no tithe-days, than on those days which were called tithe-days, whereby a considerably less quantity than the full tenth of such milk had been set out as the tithe thereof, which plaintiff conceived he was not bound to accept. And he particularly charged, that the defendant *Limbrick*, on 10th *May* next before the filing of the plaintiff's bill (being what he called a tithing-day), began to milk his cows so late as seven in the morning, and in the afternoon of that day he began to milk, as and for the tithe-meal, at three o'clock; and on 15th of same month, being what he called another tithing-day, he did not finish his morning's milking until between eight and nine of the morning of that day, and he began his evening's milking, which he pretended to set out for tithe, soon after three in the afternoon; and in like manner, and nearly about the same time, and for the same cause, his cows were milked on 20th, 25th, and 30th *May* then ensuing, both in the morning and evening. And that in or near the like manner and ways, the defendant *Cullimore* had carried on his milking, and the tithing of his milch cows from 19th *July* 1772, being what he called a tithing-day, on which day he began to milk his cows, for what he called the evening's milking, before two o'clock in the afternoon of that day; and in like manner, and for the like cause, his cows were milked on 17th *September* last, being what he called a tithing-day, on which day he began to milk his cows for what he called the evening's milking, before three o'clock in the afternoon of that day; and in like manner, and for the like cause, he milked his cows early in the afternoon of the other days in the bill mentioned, being what he called tithing-days. And the plaintiff mentioned several other instances,

instances, wherein both the defendants, on the days they called tithing-days, milked their cows very late in the morning, and early in the afternoon, and not at the hours when they milked their cows on other days, which were not tithing-days, by which mode of milking on tithing-days the plaintiff was greatly injured.

The bill also charged, that the defendants had frequently put the milk milked for tithe into unclean or unwholesome vessels, and sometimes had put rannet or other ingredients therein, to injure and spoil it; at other times had permitted pigs and dogs to drink up the same before the whole milking was over, and often permitted such pigs to get into the vessels wherein such milk was placed, and to wallow therein; and also had encouraged and permitted several poor persons to take and carry away the said tithe-milk, before the cows were all fully milked, whereby the plaintiff was injured; and the bill charged several instances, wherein such practices had been committed.

These allegations were fully proved.

It further charged, that in the parish of *Tortworth* there is no ancient custom respecting the mode of setting out the tithe of milk, and that the plaintiff in the year 1772 took the tithe-milk in the manner the defendants thought proper to set out the same, in order to prevent the same from being spoiled; but finding the same to be much less in quantity than the fair full tenth part of the milk, refused to accept the same any longer than during the said year 1772, of which he gave notice to the defendants.

The bill also charged, that since 1st *January* 1773, the milk milked by the defendants, and pretended to be set out for tithe, had been frequently thrown down or spoiled by, or by the orders and with the privity or consent of, the defendants, without giving the plaintiff any previous notice of setting out the tithe, which notice plaintiff charged they ought to have given.

The bill then stated, that the plaintiff claimed the benefit of a road over three closes of ground, in the possession of the defendant *Stock* (other part of lord *Ducie's* estate) in *Tortworth*, as appurtenant or belonging to defendant *Limbrick's* said lands, and used by the occupiers thereof, for the plaintiff to fetch and carry his tithes arising thereon to the rectory house in *Tortworth*; and that the usual gate in one of *Stock's* closes was lately taken down, and the gap made up, to prevent the plaintiff from fetching his tithes that way, whereby, if he gathered his tithes arising on *Limbrick's* lands, he was necessitated to do it in a very circuitous manner, by a road one mile and an half further about than the

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way claimed (which is only one mile and six poles) and nearly the whole thereof out of the parish of *Tortworth*, which he conceived to be unreasonable.

And the plaintiff also charged, that as the tithe of milk in *Tortworth* was valuable, he was desirous that the mode of tithing the same should be settled by the court of Exchequer, and submitted to accept the tithe thereof in the manner the other occupiers of land in the said parish thought fit to set it out, in order that the same might not be wasted or spoiled pending the suit, holding the same would not be deemed any prejudice to the right which by his bill he ought to establish; wherefore as the defendants refuse to account with the plaintiff for the value of the tithes before mentioned, the plaintiff prayed that they might be decreed to account with him for the single value of the tithes, and that the defendant *Stock* might be decreed to open the gap so made up by him, that the plaintiff might be enabled to bring home his tithes through and along the fields in the bill mentioned.

The defendants *Limbrick* and *Cullimore* said, that they occupied in the parish, and also in several adjoining parishes, lands of a great yearly value; and that they had kept thereon milch cows, which had yielded considerable quantities of milk therein.

The defendant *Cullimore* said, that in *July 1771* he received notice in writing from the plaintiff, that from and after the 5th day of *April* then next the composition between them for tithes should cease on the then terms; and that the tithes should be taken in kind, unless he would make such recompence for them as the plaintiff should approve; that the plaintiff was very exorbitant in his demands; that he therefore gave him notice in writing, that he should set out the tithe of milk at his usual milking places in the afternoon of the 10th of *April* then instant at his usual time of milking in the afternoon; that the same would in like manner be continued to be set out as it should become due; that he accordingly in the evening of that day set out the tithe of his milk then milked, being the tenth meal, computing the same from the night of the 5th of *April 1772*, making the morning's meal of the 6th of *April* the first meal from the time the former composition was by the plaintiff's notice to cease; that the same was the regular and usual mode of setting out the tithe of milk, it being by every tenth meal, and not of all the milk milked on the tenth natural day; and that having so set

out

out his tithe-milk in the afternoon of the said 10th of *April*, the plaintiff sent for and took away the same.

The defendant *Limbrick* said, that he entered on his said lands in *Tortworth* on the four several days in the answer mentioned; that his cows were brought on his lands in the evening of the said 5th of *May* 1773; that he then gave the plaintiff notice in writing that he had that evening brought on his lands in *Tortworth* ten cows; and that he should set out the tithe-milk, which would be due to the plaintiff on *Monday* the 10th of *May* in *Floodgate Mead*; that he should afterwards continue to set out the tithe-milk as it should become due at the usual milking place; that in the afternoon of that day he set out the milk of his cows then milked, as and for the tithe, the same being the tenth meal of milk next after his cows had been brought into the parish.

The defendants admitted, that *Tortworth* was a dairy parish; and said, that they had both in the years 1772 and 1773 constantly set out the tenth meal of milk, such meal being an evening meal only; and they insisted, that the tithe of milk ought not to be taken in the morning as well as evening of the tenth natural day, because then the calves must on that day go without milk to feed them; that there would be no whey to give the pigs, which in dairy farms is almost the only thing to give them, that a calf at ten days old would drink more milk than one cow would give; and that they were generally kept seven weeks, if not more, for the butcher. They further said, that the rector was entitled to the tithe of milk as long as the cows gave any; that it was usual in all dairy farms to milk their cows as long as they gave any milk, all the year round; that, as the rector was entitled to every tenth meal, they had duly set out the same; and that such milking their cows all the year round could not be to prejudice the plaintiff, because it was always usual so to do, and thereby the cows were the better; but such milking was necessary also on account of the cows calving at different times of the year, those which calve in the summer giving milk all the winter; and in large dairy farms the cows calve in almost every month in the year, so that if cows were not to be milked in the winter they must necessarily suffer great loss. They further said, that at the usual time after the calving, when each cow came to the pail, they had regularly on the next tithe-milking set out the milk of such cows with that of the others which had been before in milking, which was giving the rector a considerable advantage. They insisted, that the legal mode of tithing

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milk was by setting out every tenth meal of the whole herd, and not by setting out the tenth meal of each cow, computed from the time of its first coming to the pail. They denied, that they had pretended that the plaintiff was entitled to the tenth evening's meal only, and no other for his tithe, but said that he was entitled to the tenth meal, whether it happened to be in the morning or evening; and that they had severally set out on every fifth day the tenth meal of their whole respective herds. They also denied, that in order to prejudice the plaintiff they had used any unfair practices to lessen the quantity or value of his tithes, or that on tithing-days they had milked later in the morning and sooner in the evening than was usual on other days; for on the contrary their orders to their servants always were to use no unfair dealings whatever to prejudice the plaintiff; they then stated the particular hours in the morning and evening, in the several various seasons of the year, when they began their several and respective milkings as fully mentioned in their answers.

The defendant *Cullimore* set forth the other tithable matters and things he had on his said farms and lands, and spoke fully as to the farm occupied by the defendant *Stock*, and respecting the way through the said farm, which the plaintiff said he had a right to take his tithes through, and denied the plaintiff had a right to go over the closes in the bill mentioned.

The defendant *Stock* denied the right of the plaintiff, or of any other person to go over the closes occupied by him. He admitted, that he did cause the gate to be taken down and the gap hedged up, and insisted that he was justified in so doing, and in preventing the plaintiff from going over any of the said closes, he having no right so to do.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on the cause coming on to a hearing, and the arguments of counsel having been gone through, Mr. Baron *Eyre* delivered the opinion of the court, the Chief Baron *Smythe* being absent from indisposition.

Eyre B.—Dr. *John Bosworth* rector of *Tortworth* in the county of *Gloucester* file; his bill against three defendants, *Joseph Limbrick*, *Joseph Cullimore*, and *John Stock*, praying against *Limbrick* an account of the tithe of milk from the 5th of *April* 1773; against *Cullimore* an account of the tithe of milk from the 1st *Jan.* 1773: also an account of the tithe of hay of parcel of the meadow called the *Lagger*, mowed in the year 1772; of potatoes dug in the year 1772 and 1773; of

Easter

Easter offerings; and, under the general words "tithable matters," the plaintiff's counsel also pray against *Cullimore* an account of agistment-tithes. As against the defendant *Stock*, the plaintiff prays to have a road opened over lands in his occupation by which the plaintiff may carry off his tithes arising upon lands in the occupation of the defendant *Limbrick*. The case of the last of these defendants is unconnected with that of the other two, and it arises from the following facts:

The lands now in the several occupations of *Stock* and *Limbrick* were before occupied together as one farm; and there was then a communication from *Limbrick's* part over that of *Stock's* with a publick highway in the parish of *Tortworth*, which communication is now obstructed by the defendant *Stock*. This would be the nearest and most convenient road for *Dr. Bosworth* to carry off his tithes; and he has brought some evidence to prove that this line of road is in fact a publick highway. It appears, that there is another communication by the high road from *Tortworth* through part of the parish of *Charfield* over lands in the occupation of *Sarah Cullimore*, who has refused to permit *Dr. Bosworth* to pass that way. It further appears, that *Limbrick's* lands communicated with his farm-yard, whence there is a communication with the high road in the parish of *Charfield* leading to the parish of *Tortworth*, and that this would be the farthest and most inconvenient road for *Dr. Bosworth*.

The tithe-owner is not entitled to the use of a private road, which was made while the lands were in the occupation of one person, after they are split into several occupations.

We are of opinion that this is not a case in which a court of Equity can interfere. If the road is a publick one, the plaintiff's remedy is at law, either by indictment, or, in respect of special damage, by action on the case. The parson must undoubtedly have a right of way to carry off his tithes from the place on which they arise; and the occupier must open a passage for him, or he subtracts his tithes. Ordinarily, the parson is understood to have a right to use the same road which the occupier uses. If the occupier has a right, the parson has also. It is accident whether this way is more or less convenient, nearer or farther. Its being the nearest cannot alone give the parson a right to pass over another man's land. There having been a communication when all the lands were in one occupation, which the parson might then have been entitled to use, because the occupier used it, is no argument in support of a claim to use it, when the occupation becomes several. The several occupiers may have no right to use it, therefore the parson can derive no such right from them. As against the defendant *Stock*, therefore, this bill must be dismissed with costs.

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The question in regard to the hay claimed of *Cullimore* depended merely on a matter of fact; whether, in truth, the tithes had been subtracted or not. The court were of opinion on the evidence, that the tithes had been subtracted.

Potatoes must be titiled on the spot where they are dug.

The case made by the plaintiff respecting potatoes, is that of a few bushels of potatoes raised in a field called *How Croft*, which in 1773 were dug up and brought home to the defendant's house without setting out the tenth part. The defendant insists, that after they were brought home and placed in the brewhouse, they were there measured and duly set out for the plaintiff.

This is certainly not a due setting out of this species of tithe. The parson has a right to insist, that a tenth part should be separated from the nine part upon the spot where the potatoes are dug, and before they are removed. As to this article, therefore, an account must be directed.

Agistment-tithe is due for beasts of the plough, if they are used in another parish.

In regard to the agistment-tithe, there was a point made at the hearing, whether beasts of the plough depastured in the plaintiff's parish, and used by the defendant in another parish, should pay an agistment-tithe.

Supra.

If it were proper to consider this question now, I need only refer to the case of *Scoles v. Lowther*, 1 *Ld. Raym.* 129, 130. which is in point that they shall pay. And the reason is obvious. Being depastured in the same parish where they work, the *uberiores decime*, which are the effect of their labour, are a satisfaction for the tithe of their pasture. If they work in another parish, there can be no such satisfaction, and the parson must have an agistment-tithe or none. But the question will remain open to be discussed, if the parties think fit, when the charge for agistment is brought before the Deputy Remembrancer.

The parson is entitled to the tenth morning's meal of milk, and the tenth evening's meal of milk, for his tithe of milk.

We come now to the great question in the cause, the plaintiff's claim to an account of the tithe of milk, as against the two defendants *Limbrick* and *Cullimore*.

These defendants profess to have duly set out to the plaintiff for his tithe every fifth evening's meal, which they say is the tenth meal, which the parson is entitled to. They having brought their cows to the pail in this parish in the morning, and beginning to count from the morning of that day to the evening, and so on, the fifth evening's meal of milk makes the tenth meal, which is the parson's due. The plaintiff contends that the setting out of every fifth evening's milk is not a due mode of tithing.

The argument for the plaintiff assumes this fact, that the produce of the evening's-milk must always be less in quantity than the morning's

ing's meal; and the witnesses on both sides agree that the fact is so. *Clark*, the plaintiff's witness, made a great number of experiments in order to ascertain the proportion in which the evening's meal fell short; and it appeared upon the result of these experiments, that it frequently fell short a third, but never less than a fourth of the morning's. It follows that a fifth evening's meal constantly set out must produce less than a tenth part of the milk. This being the fact, the argument then proceeds thus.—The tithe of milk, as of all other tithable matters, belonging *de jure* to the parson, is the tenth part of the milk produced. A rule of tithing, therefore, which necessarily gives to the parson less than the tenth cannot be the true rule. It was admitted that it had been thus far settled by the few cases which are to be found upon the subject of the tithe of milk, that neither the tenth part of every cow's milk at every meal, nor the tenth part of each meal, was to be set out for the parson, and that the tenth meal was to be set out. But the plaintiff insists, that the tenth meal must not be so computed, as necessarily to produce less than a tenth part of the whole ten meals measured together. The plaintiff's counsel endeavoured to point out a manner of taking the tenth meal which would not be liable to this objection, *viz.* taking a morning's and evening's meal alternately, or the whole milk of the tenth day. The defendant's counsel say, that in the one case it would be taking the 19th and 20th meals, instead of every tenth; in the other case, it would be sometimes the ninth, and sometimes the eleventh: in either case therefore they contend, that this would be departing from the rule of law settled by several determinations.

Upon general principles it seems improbable that that should be the true rule of tithing, which puts it in the power of the farmer to give the parson a twelfth or fourteenth instead of a tenth. A prescription to pay less than a tenth without a compensation would certainly be a bad prescription. When the tenth meal was declared to be the right of the parson, it was substituted in the room of the tenth quart, or the tenth part of each meal. It was not meant to give less than a tenth, but the tenth in a more convenient form. It was auxiliary to the general right, and intended to fortify, and not to destroy it. If it turns out to be capable of being made to operate to the destruction of that right, (as it will certainly do in the sense in which the defendants understand it), it should seem, that the right would be to be supported, and the rule condemned as not warranted by the law of *England*, and fundamentally erroneous in

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the original conception of it; and to correct this rule would be restoring, not altering the law. But we ought not hastily to condemn a rule laid down upon great debate and consideration of different modes of tithing. We ought rather to suspect we have not understood the true sense and meaning of the rule. Unquestionably, if a construction can be put upon this rule, which will preserve the original spirit, truth, and justice of it, and put it out of the power of any man to make it an instrument of fraud; the court will incline strongly to adopt it. We think such a construction may be put.

The morning and evening meals being necessarily unequal in produce, may and ought to be considered as distinct tithable matters, from each of which you may count on to the tenth; and that tenth will be the tenth meal of the description to which it belongs, and, as such, the tithe meal either morning or evening; and thus the parson will have a fair chance for a full tenth of the whole milk, instead of necessarily taking less in the defendant's way of setting out the tithe.

As to authorities, upon a careful review of all the cases, we not only do not find any adjudged case standing in our way, but we collect, that the rule of the tenth meal was originally understood in the sense in which we think that it ought to be construed.

1 Wood
176.

There is an older case than any cited at the bar, that of *Silcocke v. Ives*, heard in this court 6th May. East. 30 Car. 2. The bill was (*inter al.*) for tithe-milk in the parish of *West Tilbury* in the county of *Essex*. The defendants insisted, that the custom of the parishioners was to pay the tenth day's, or tenth meal's milk from the 1st day of *May* to the 1st of *August* yearly, in full satisfaction of all tithe-milk throughout the year. The court held the custom to be illegal. The language of this case is material to shew, that two successive meals were included in the idea of the tenth meal's milk.

Supra 527.
Sir T.
Raym. 277.
Freem. 329.

Dodd v. Ingleson is the next case in order of time. In that case, the plaintiff claimed under a custom in the parish to have his tithe-milk brought home, and that he was not to take less than the whole milk of all the cows every tenth day. The defendant denied this claim, and insisted, that the vicar was to fetch his milk, and that he was to have his tithe-milk at every meal. The court being unanimously of opinion, that the tenth meal's milk, and not the tenth of every meal's milk, was to be paid, it is taken for granted by the parties, and therefore ordered by consent of the defendant, that for the future, the defendant should pay his whole tenth meal's milk every

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every morning, and his whole tenth meal's milk every evening. This was interlocutory, the other point upon the custom not being then determined. Afterwards, there is a final decree in the same words, not said *by consent*. From this case we may fairly collect, that both the court and parties at this time understood, that the tenth meal's milk included two successive meals.

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Lord Raymond in his first volume, 358, reports the case of *Hill v. Vaux* in prohibition; and that again is on a usage to set out two successive meals for the whole tithe-meal.

2 Salk. 656.
S. C. Carth.
461.

The next is the case of *Ekins v. Bridges*, in this court the 26th of April 1703. The custom as there stated takes for granted, that it is the meal which is paid for tithes in kind, and it is the milk of the ninth night and tenth morning which is the tithe-meal.

1 Wood
416.

These are the four first cases to be found relative to tithing by the meal. In the three first it appears to be the custom of the country, that the tenth-meal given for the tithe included two successive meals. The fourth is an adjudication, that where it was declared the tenth meal's milk ought to be paid, two successive meals ought to be paid.

There was a fifth case to the same effect in 1731. *Brincklow and others v. Edmunds*, 8th November, reported in *Bunbury* 307. but see the Decree-Book. The custom here was to pay the tenth evening and morning's meals milk commencing upon the evening of the next Monday (being the Monday fortnight after Easter Day) and the morning following to All Saints Day yearly. Two cases, *Bate v. Sprakling*, 18th February 1717, and *Dodson v. Oliver*, East. 21. had intervened between the two last cases: but as the others all pointed one way, we thought it best to shew them together. From the tenor of these cases as well as from the reason of the thing we collect, that the true construction of the rule of tithing by the tenth meal is, and was originally, that the tenth morning's meal, and the tenth evening's meal are to be paid, and not the tenth meal, reckoning morning's and evening's meal together. Thus the objection that this would be taking the nineteenth and twentieth meals is answered.

Supra 711.
2 Wood
314.

Supra 618.
Supra 623.

The argument of inconvenience to the farmer from the being obliged by this method to part with two successive meals has weight; but it must not be suffered to outweigh the justice of the case. The customs of taking two successive meals appear by the four cases above cited to have been insisted on by the farmers themselves; and they come out of the heart of some of the dairy counties,

Essex,

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Essex, Berks, Northamptonshire. There hardly exist any modes of taking tithes in kind wholly free from inconvenience. The inconveniences are probably mutual. In future they will suggest mutual accommodation; and a reasonable composition will be settled between the parson and the farmer.

Four cases were cited by the defendants as having established that the tenth meal was to be taken for the tithe of milk. The first was *Dodd v. Ingleton* from *Sir Thomas Raymond*. But this, corrected and explained by the Decree-Book, is in truth an authority for the plaintiff; for the court having adjudged that the tenth meal is to be paid, as a consequence order the tenth meal of the morning and the tenth meal of the evening to be paid.

Bate v. Sprakling, from *Bunbury*, is a loose note of a case decreed in *Hil. 1717*, which says that it was decreed that tithe-milk ought to be paid every tenth meal. From the Decree-Book it appears that the defendant had set out the tenth part of each meal. This was clearly wrong, and the defendant was therefore decreed to account. The court were not called upon to say, nor did they in fact say, how the tenth meal was to be computed.

The third case was *Dodson v. Oliver*, *Bunb. 73*. This too was a very loose note, and the substance of it, as far as regards the manner of taking the tenth meal, seems to be a note of the Reporter's own understanding of what was the general rule as to the manner of taking tithe-milk, not of what had been decided in that case. In the Decree-Book the bill appears to have been (*inter alia*) for tithe of milk. But there was no point made in the cause upon the manner of tithing milk, nor is there any declaration by the court upon it. If any thing of this sort fell from the court, it was general and certainly not pointed to the distinction between the tenth meal, reckoning morning and evening meals together and separately, which is our point.

Supra 826.

The last case is, *Carthew v. Edwards*, in this court 1st *May* 1749, and 5th *June* 1749. Here, there was a declaration by the court in these words, which I have taken from the Minute Book, the decree itself having never been drawn up for a reason which will appear presently. "The court declare, that the defendant ought to have milkt the tenth meal of his cows in vessels of his own, at the place and in the manner he milkt the said nine meals, and that the plaintiff ought to have fetched it away in his own vessels." And it appearing to the court, "that the defendant poured the tithe-milk into holes or pits made in the

“ground, the court decree, that the defendant is to account for the same to the plaintiff.” The defendant then agreed to pay 30 l. in lieu of what should be due on the account, &c. which was therefore decreed. I suppose the money was paid, and so the decree was never drawn up. I called for the pleadings in this case, and from them it appears that the single point in dispute was, who was to carry the tithe-milk home. In that the defendant succeeded, but not having set out his tithes well, because he poured the milk into holes immediately, therefore he was decreed to account. The question now before the court was not in contemplation in this, nor in any of the other cases, nor was meant to be decided in any of them. Consequently, they are not to be understood as cases adjudged on the point, which was the proposition I meant to establish.

There appears to us therefore to be nothing in point of argument or authority, which should prevent us from effecting the justice of the case between these parties, by declaring, that the defendants ought to have paid to the plaintiff the tenth morning’s meal and the tenth evening’s meal, in which having failed, they are now to account.

To prevent mistakes I would add, that it is by accident it happens in this particular case to be the whole milk of the day. If the cows had been begun to be milked in the evening instead of the morning, the tithe-milk would have been due in the evening and in the morning of the succeeding day, which would have been the *Jewish* day which we have heard of.”

The court therefore declared the plaintiff entitled to the tenth morning’s meal of milk and the tenth evening’s meal of milk, and ordered the defendants *Cullimore* and *Limbrick* to account for the same with costs.

From this part of the decree, which related to the tithe of milk, there was an appeal to the House of Lords, which was heard on the 2d and 3d of *February* 1779, when the decree was affirmed without any debate or division. The case was argued by the Attorney General and *Mansfield* for the appellants, and by *Dunning* and *Harding* for the respondents; and before the Lord Chancellor *Thurlow*, and the Lords *Mansfield*, *Bathurst*, *Camden*, &c.

The reasons in objection to, and support of, the decree, as urged in the printed cases, were as follows:

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1. The mode of setting out tithe of milk by the tenth meal insisted on by the appellants, has been long established and universally received. It seems to have been first introduced from an inclination to favour the clergy, who, in ancient times, were supposed to be entitled to only a tenth part of every meal of milk, which at every milking they were obliged to send for and take away, and to whom therefore it was much more convenient to have the whole of every tenth meal allotted to them, which they might receive altogether at one milking, without the trouble of sending more than once for their tithes. The mode of tithing contended for by the respondent, and established by the decree, that is, by giving to the respondent the whole meal of every tenth morning and every tenth evening, is perfectly new. Instead of giving to the parson the tenth meal, it gives him the nineteenth and twentieth meals, which is not only not warranted by the cases in which the parson has been determined to be entitled to every tenth meal, but is directly contrary to them. And it seems, that the parson might with as great appearance of reason have pretended a right to the milk of the first and the twentieth meals, every meal or milking being in itself, as well as in the language of the cases relative to this subject, perfectly distinct, there being no more connection between the nineteenth and twentieth meals, than between the first and the twentieth.

2. The mode of tithing thus established by the decree is not only not warranted by any decision relating to the tithe of milk, but is also contrary to the mode of tithing, which prevails with regard to all other species of tithes, and to the general rules by which this kind of property is regulated; the owner of tithes being universally entitled to the tenth part of the subject to be tithed, and nothing more, and the decree here giving to the respondent not the tenth part of the milk, but the nineteenth and twentieth parts.

3. This mode of tithing by the tenth morning and tenth evening's meals will subject the farmers who have large dairies to most unreasonable hardships, where the tithe of milk is thus taken in kind. Besides other inconveniencies to the farmers above pointed out, their calves, which can only be supported by new milk, must every tenth day be destitute of food and subsistence. By such a mode of tithing, therefore, a parson will acquire a power of exacting an exorbitant recompense for his tithe of milk, or
where

where a farmer has incurred his resentment, of injuring and oppressing him, by taking such tithe in kind.

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The Respondent's Reasons.

1. That a rector is entitled, *de jure*, to a full tenth of all milk of cows within his rectory, as well as a tenth of all other tithable matters there arising; and so the court of Exchequer declared.

2. That a mode of setting out a fifteenth, or any thing less than the full tenth, for tithe, as the appellants had done, cannot be the true rule of tithing, if the rector be entitled to a full tenth.

3. That a prescription to pay less than a tenth is a void prescription.

4. That when the tenth meal was originally declared to be the right of the parson, it was substituted in the room of the tenth quart, or the tenth dish, or the tenth part of each meal; it was never meant to give him less than a full tenth of the tithable object; it was meant to give the tenth in a more convenient and useful manner; it was therefore auxiliary to the general right of a free tenth, to secure and not to destroy that right.

5. That the setting out the tenth part of every meal, as also the setting out the tenth of each cow's milk at each milking, have been condemned as founded in inconvenience to the parson from the great unnecessary trouble and expence it would create by those numerous and frequent tithings. Upon the same principle, the attempt of the appellants to make one and the same day to be successively and perpetually the tithing-day of milk for all the farmers in this parish (where near 400 cows are milked daily) is illegal; as it would be productive of vast expence and distress, in procuring a proper number of persons, horses, and utensils, to be employed by the parson, or lay impropriator, in collecting and making it into cheese or butter; and the expence and trouble of collecting and manufacturing it, would greatly exceed the value of the tithe-milk, if it could be so collected, and in the end would make the tithe-milk (which if set out fair is a valuable tithe) to be of no worth to a parson or lay impropriator, but would subject him to vexatious suits, for not fetching it away in convenient time after it was set out, though perhaps, it was not in any man's power to do it.

6. That the tenth meal, and the tenth day has been and ought to be considered as expressive of one and the same idea, and the tenth of the morning's milking and the tenth of the evening's milking, have conjunctly been considered as the tenth meal; and so it was determined in the cause of *Dod*, vicar of *Chigwell* in *Essex*, against

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against *Ingleton*, where the court decreed, that the defendant ought to pay the whole tenth meal's milk of all his cows every tenth morning, and the whole tenth meal's milk every tenth evening, as and for tithe of milk.

7. There have been also divers other cases of customary tithings, where, in the general understanding of the country, the tenth meal included two successive milkings, namely, the tenth morning's and the tenth evening's milking, and this sense of the tenth meal was insisted on by the farmers themselves, and all those causes arose out of the herds of dairy counties, viz. *Essex, Northampton, and Buckingham*.

8. That the produce of an evening's milking (as proved in the cause) is on an average throughout the year at least one third less than that of a morning, owing to the space of time between the morning's milking and the evening's milking being much shorter than that between the evening and the morning's milking, and to other causes, such as heat of weather, flies, and the like; an evening's milking therefore fails of being a full tenth of the milk milked from the cows at ten successive mornings and evenings milkings, and is no more than setting out a part for the whole, which is void.

9. That the setting out the tenth milking on every fifth day in the morning alone for the tithe, would be as much too great, as an evening's meal would be too little, and would be full as prejudicial to the farmer as the other would be to the parson, and therefore neither of them alone ought to be adopted; but the setting out the tenth morning's milking as the tithe of the mornings, and the tenth evening's milking as the tithe of the evenings milk, avoids both objections, whether the computation begins in an evening or a morning, and at once establishes an equal general mode of tithing between farmer and parson, founded in justice and equality, the highest equity.

Objections
answered.

Objection.—But to this, inconvenience is objected on the side of the appellants.

Answer.—No inconvenience ought to outweigh the justice of the cause; the farmer ought not to be permitted to take a manifest unjust advantage to himself by yielding one third less than what is due on that account.

Objection.—That if two successive milkings, viz. in a morning and an evening, are established as the tithe-meal, then the farmer's calves on that day must go without new milk, and there will be no whey

whey to give the pigs, which, in dairy farms, is what the farmer depends on.

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Answer.—Calves are tithable when weanable, that is, when of an age to live without the dam, or natural food, as grass or hay; the appellants say, when the calves are three weeks old in summer, and one month in winter, they can so live; consequently, till those periods the whole milk of the cow is applied for the support of its own calf, and none set out for tithe; hence no inconvenience or want of milk for calves results from this mode of tithing, as the whole milk of each cow is applied for the support of its own calf until weaned and gone; at which time the cow may be said first to come to the pail, and to be tithable; that the milk of each cow is alone sufficient for raising its own calf; that as the calf advances in age, it has daily less occasion for milk, being gradually more and more able to support itself by grass and hay, until it accomplishes the full weanable age, to live solely on the same food as the dam does; that the calves destined for tithes are always left by the appellants in a state of nature, to subsist on the milk of their proper dams only.

The law of tithes, as well as of other things, should rest on principles that are fixed and certain; it is intended to be a rule of conduct equally obvious to the receiver of tithe as to the payer; but, if the introduction of new and artificial modes of rearing calves is to vary and alter the parson's right, originally settled on the immutable laws of nature, there will remain no settled law, no known rule of conduct for the parson, but the will and capricious practices of the farmer will constitute the law. And why not in every other species of tithe, if allowed in this?

That it appears abundantly in proof in the cause, that in dairy farms (such as the appellants are) calves fall between the months of *January* and *April* yearly, and at no other times in the year, except an accidental calf, and all calves are generally gone from the cows by the month of *April*; so that there are seven months yearly, including the whole of the summer, the most advantageous season for making butter and cheese, when the cows are without any calves; consequently, their milk is not then wanted for the support of their calves.

As to pigs, it is notorious, that they may be, and are supported from the preceding day's milk, as well as from whey, wash, corn, and other such like food; and that they never depend upon the produce

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duce of the day for subsistence, but are provided with a stock of food beforehand.

P. 18 Geo. III. A. D. 1778. Scac.

Lowther v. Bolton. [MS.]

It is sufficient to sustain a bill for tithes by a layman to state generally that he is entitled to them.

SIR James Lowther filed his bill, stating, that he was and for many years past had been seised in fee and proprietor and owner of all and every the tithes of corn and grain, and other great and predial tithes whatsoever arising, growing, and renewing within the manor and parish of *Askam* and the liberties and precincts thereof.

The defendant demurred, for that the plaintiff had not shewn by his bill any title to the tithes.

In support of the demurrer it was urged, that the plaintiff stated no title whatsoever to the tithes, inasmuch as he did not state that he was seised of an impropriate rectory, or of a portion of tithes, or of the tithes of an extraparochial place, or, in fine, what was the nature of his title.

The demurrer was over-ruled; and it was holden sufficient to sustain a bill for tithes, to state that the plaintiff was entitled to the tithes without more. *Crahorne v. Taylor*, *supra* 650. *acc.*

P. 18 Geo. III. A. D. 1778. B. R.

Haywood v. Nicholls. [MS.]

Qu. If evidence of immemorial payment only be sufficient to prove a composition real? What is evidence of a modus being rank?

THIS was a feigned issue founded upon an inclosure bill to try 1st, Whether a sum of 4 l. paid in lieu of the tithes of a farm was paid as a modus in lieu of the tithes? 2d, Whether it was paid as a composition real?

This cause was tried before Mr. Baron *Eyre* at *Oxford*, and on the trial it was proved, that the sum of 4 l. had regularly and immemorially been paid in lieu of the tithes of this farm, which consisted of 114 acres, and is now of the value of 70 l. a year. It was also proved that about sixty or seventy years ago, the farm was let for 54 l. a year.

For the defendant it was insisted that the modus was rank; and to shew it to be so, a licence of alienation in the time of *Edw. 6.* was proved, in which the value was stated to be less than 5 l. *per annum.*

The defendant's counsel also relied upon the statute of *Eliz.* which directs that the third part of the annual value of lands leased by colleges (which the present farm was) shall be reserved in corn at the rate of 6 s. 8 d. *per* quarter, which is not above the sixth part of the value of corn now, and therefore it was said, the land could not be above the sixth part of the present value at that time.

A great part of the farm was proved by reputation to have been formerly woodland.

Baron *Eyre* told the jury, that where there was no other evidence given than that of payment of a certain annual sum, it must be considered as proof of a *modus*, and was not sufficient to prove a composition real.

The jury found a verdict on the first count of the declaration, which was for the *modus*.

Adair Serjeant moved for, and obtained a rule to shew cause why there should not be a new trial, on the ground that 4 l. was in this case a rank *modus*.

Bearcroft for the plaintiff.—The rankness of a *modus* is a question of fact, and not of law. A composition real is a composition made by persons who had a right to make it; and till the 13th of *Eliz.* the parson, patron, and ordinary, might make such composition. In *Smith v. Chapman*, 2 *Vez.* 506. there was a *modus* of ninepence *per* acre for marsh land; and though it was proved that in the time of *H. 8.* the land was worth only 2 s. an acre; yet that was sent to a jury. This farm consists of 114 acres, and it is uncertain what was the value formerly. The arguments for the defendant are extremely weak; for the value of the land in the time of *Edw. 6.* is not proved by the value given in for the licence of alienation. When a value is given in for the purpose of being taxed, it is never above half the real value. Supra 847.

The judge at the trial said, it could not be a composition real, but must be a *modus* or nothing; for else every rank *modus* would be supported as a composition real.

Miles S. S.—The judge held that constant payment of a certain sum alone would not be sufficient to establish a real composition. But there is no foundation for that in the books; and the deed may be presumed to be lost. As to the licence in the time of *E. 6.* besides the favour always shewn in such cases, there appeared to be a lease before that time (*x*) for a sum paid, and a rent of 4 l. *per*

(x) This was not so stated in the report.

1778. *annum. 3 Atk. 534. Bunb. 401.* In *Williamson v. Caley* lately in the Exchequer, and tried at York spring assizes before Gould J. 10 l. a year was holden to be a good modus for a farm, though the present value was proved to be 100 l. or 140 l. a year.

There is no evidence in this case that any other payment was ever made.

Adair Serjeant contra.—I consider the question as open, whether the verdict can be supported on either count. In *Smith v. Goddard* in the Exchequer at the sittings after last Michaelmas term, a modus was proved to have been paid regularly for 150 years. The defendant afterwards varied his case, and instead of stating it to be a modus, stated it as a composition real; but the court would not grant an issue on that ground, but only whether it were a modus or not (y); because the mere fact of payment was no evidence of a real composition. If it were to be holden otherwise, there would be an end of the doctrine of a modus being rank. The question then is, Whether the verdict for the modus is warranted by the evidence given? If the licence do not prove the real value, yet it shews that the estate was something near that value. In the reign of queen Elizabeth the value of corn was not a sixth part of what it is now, and therefore land could not be above a sixth part of the value that it is now.

Lord Mansfield.—To support an uninterrupted usage you presume any thing. I take the distinction between a modus and a real composition to be settled. There is a great difference between a modus which is rank upon the face of it, and which is to be made so by evidence; as, if there were a modus of one shilling for a sheep, that would be rank upon the face of it.

Buller J. held, that the evidence on the part of the defendant was so extremely slight, that there ought not to be a new trial. For the licence was no proof of the real value; which seemed to be admitted by the counsel, because they contended only, that it was something near the value; but how near, or what proportion it bore to the real value was quite uncertain. And as to the price of corn, it ought to have no weight at all; because this was not an arable farm only, and formerly great part of it was supposed to be woodland. Besides, there was a presumptive proof that this estate was of much more considerable value formerly, than was supposed by

(y) Lord C. Baron told Buller J. that this case was determined on the particular circumstances of it, and no general rule was laid down.

the defendant; for though most lands within the kingdom have been raised one third in value within twenty years past, yet this farm has been raised only one fifth in value within sixty or seventy years past.

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The counsel for the defendant then said, the cause was brought on by surprize upon them; that the issue was not delivered until the end of the term; that it was a considerable time before it was settled, and the assizes were so soon after, that they could not get a special jury struck, which they otherwise intended to have done.

Lord *Mansfield* upon this said, he thought, as it was a question of some consequence, the defendant ought to be at liberty to try it by a special jury; and so a new trial was granted upon payment of costs, with directions that it should be tried by a special jury, and nothing should be said of its being a new trial, so as to prejudice the question at all.

N. B. Mr. J. *Willes* was of opinion that the modus was rank.

The cause was tried a second time at the summer assizes, and a verdict for the plaintiff again.

Tr. 18 Geo. III. A. D. 1778. Scac.

Caley v. Williamson.

Savoe v. Sellar. [MS.]

THIS cause came on for further directions. It was a bill for subtraction of tithes. The defendants had in each cause set up a modus for the two farms of 10 l. payable half yearly, and had obtained a verdict. The only question was as to the costs. The defendants set down the cause, and alleged, that the bill ought to be dismissed with costs, because, besides the general rule, the plaintiff had been vexatious in bringing two bills, which made double expence necessary. The plaintiff alleged, that the defendants might have prevented that by moving to admit in one cause the evidence in the other; that it was a hard case, apparently a rank modus, the value of the estate 40 years ago being 120 l. only, and that plaintiff had a probable cause of litigation. But *per Cur.* Two bills are a reason for dismissing with costs. The bill was accordingly dismissed with costs (2).

If a plaintiff brings bills against two, where the question might have been determined upon one bill, and does not succeed, both bills will be dismissed with costs.

(2) Qu. If this was not a hard case, and see 4 *Wood's Decr.* 4.

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C A S E S.

Tr. 18 Geo. III. A. D. 1778. Scac.

Vyse v. Duntze. [MS.]

What certainty is necessary in the description in the answer of the lands to which a modus is applied.

THIS was a bill for vicarial tithes, to which moduses were set up for four farms. *Kenyon* objected to the manner of laying the modus for want of first stating, that "there is a certain ancient farm consisting of so and so," in order to apprize the plaintiff of what the claim precisely extended to. The answer only stated, *that the defendant is owner of an estate called H. and so on.*

Macdonald for the defendant said, that the certainty was supplied by the plaintiff's bill, which stated, that these four estates consisted of 200 acres, and the defendant admits himself to be owner of these estates with the qualification.

Heath Serjt. S. S. insisted, that it was not necessary to lay it more certainly, because it need not be proved: it would have been good if laid, "more or less;" if so, it is certain enough. It is not necessary to state the number of acres in particular.

Kenyon in reply said, it was convenient that certainty should be attained; because as it is to deprive the vicar of a quantity of tithes, it should be known what that quantity is. Nor is it certain taking the bill and answer together; because here are several moduses, and it is necessary to know to how much each particular modus applies. As to the park, it is always stated to be an ancient park. The word immemorial is applicable in the answer to the payment only, and not to the land. He cited *Burwell v. Coates*, *Bunb.* 129. and *supra* 646. as in point.

Lord C. B. The use of stating the number of acres is to ascertain the land: if it is ascertained by another means, the end is answered. The question is, whether that is here done? It is not so uncertain as the case in *Bunbury*, for there only a farm was mentioned without a name. I therefore doubt upon it.

The other Barons thought that the name did not give sufficient certainty, and that it was not supplied by the bill.

The cause stood over with leave to amend.—Note, *Kenyon* thought it a very critical objection, and *Heath* found two or three authorities against it the next day, but the merits being against him, they were not mentioned.

Tr. 18 Geo. III. A.D. 1778. Scac.

Philips v. Prytherick and others. [MS.]

LORD C. B. delivered the opinion of the court.—This was a bill brought for an account of tithes by the lessee of the bishop of Lincoln the rector of *Lanlley*, otherwise *Lanllney*, and the chapelry of *St. Michael* in *Roscorney* in the county of *Caermarthen*, against the defendant *Gwynne* the owner and others, who are the occupiers. The occupiers at first were the only defendants, and they set up a modus of 4 l. in lieu of tithes; but it appearing that the persons to pay the modus were not specified, and also that the tithes themselves had actually been collected by the landlord, the court thought fit to require that the owner should be made a party in order to enable her to make a fuller defence. It was done accordingly: but she being an infant, and her first answer alleging only a modus, similar to that set up by the occupiers, leave was given to amend (a) her answer, by stating her defence so as to correspond better with the facts in proof. In her amended answer she alleged that “she is seised in fee of certain lands called *Forest Glyn Cothy* situated partly within the chapelry of *St. Michael Roscorney* and partly in the parishes of *Berofha* and *Llanvillangen Yers* out of the said chapelry, and of three tenements within the said chapelry; and that she and all those whose estate she hath in the said three tenements and in so much of the said forest as lies within the said chapelry, hath and have from time immemorial paid to the rector of the said rectory and chapelry for the time being 4 l. yearly, as a pension or payment in satisfaction of all tithes arising or renewing upon the said three tenements, and so much of the said forest as was situated within the said chapelry; and that she, and all those whose estate she hath, &c. hath and have from time immemorial been used to have, and ought to have in respect of the said pension or payment so paid, the tithe or tenth part of all corn, grain, hay, and other tithable matters arising upon the said three tenements, and so much of the said forest as lay within the said chapelry.” It was objected to this prescription, that no lay person can prescribe for tithes arising upon his own estate; for that if any agreement were made between rector and land-owner, that a

(a) The court of Exchequer have since refused to do this;

1778. gross sum or an annual payment should be made to him, and that the tithe should for ever after belong to the land-owner, the land would thereby become discharged of the tithe, and the tithe would from that time cease to exist. In support of the prescription was cited the case of *Piggot v. Sympfon* in the 42 *Eliz. Cro. El.* 763. from which case this prescription was said to have been transcribed. To this it was answered, that *Piggot v. Sympfon* differed materially from the present case, for in that the lord prescribed for tithe as appurtenant to his manor, arising upon the lands of others; here, the defendant prescribes for tithes arising upon her own lands. But as to this, the reasoning in *Piggot v. Sympfon* is observable, viz. "for when the lord hath used from time whereof, &c. to pay this sum, &c. and in respect thereof to have all the tithe within his manor, it shall be intended that at the beginning the lord *had all in his hands*, and then might prescribe to pay a sum in discharge of all the tithes, and when he gave the tenancies to hold of him, and always after to have the tithe of those lands, it is a very reasonable prescription, for now he hath no more than what he had before, *for he had them before by retainer, and now he takes the tithes themselves*." Hence it appears, that two species of prescriptive rights were allowed by the court. 1st, To retain the tithes so long as the land remained in the original owner. 2d, To receive them after the lands were granted out. The tithes therefore are throughout considered as existing always distinct from the land, inasmuch too that it is there said, that the lord might sue for them in the spiritual court. Nor was this case of *Piggot v. Sympfon* the first decision upon this point: it had before been determined in *Piggot v. Hearn*, *Cro. Eliz.* 599. the reason on which the court had gone in that case is here stated. This of *Piggot v. Hearn* is also cited at the end of the *Bishop of Winchester's case*, 2 *Co.* 45 a. where *Sir E. Coke* says, that two points were resolved therein. 1. That in such special case, a lay person, owner of the said manor, shall sue for the tithes upon all the special matter aforesaid in the spiritual court, for it shall be intended at the beginning, the lord was seised of the whole manor before the tenancies were derived thereout, and then by composition, or other lawful means, the lord should have all the tithes within the manor for the said pension paid to the parson; and the law intendeth that at the beginning it was for the maintenance of divine service, & *pro bono ecclesiæ*, the reason of which intendment is the continual usage *a tempore cuius*, &c. 2. That upon this special matter alleged, a man may have tithes as appurtenant to a manor; for he prescribes by a *que estate* in the manor, and therefore

Supra 203.

Supra 200.

therefore cannot have them in gros. But it is there said to have been adjudged in *Winchcomb's case*, 35 *Eliz. Cro. El.* 293. that a man cannot prescribe generally in him and all those, &c. to have any tithes appertaining to the same, for without such special matter shewed, tithes, which are spiritual things and due *jure divino*, cannot be appurtenant to a manor or any other temporal inheritance. In *Piggot v. Sympsen* the tithes must have been considered as existing always distinct from the land; if in his own hands, the lord might retain them; if in the hands of grantees, he might take them. Nor do I see any reason why they may not be prescribed for in the same manner as appurtenant to land, as well as appurtenant to a manor, the tithes themselves being constantly preserved by virtue of the supposed original agreement.

Upon this ground it appears to me that the prescription may be good in law; and as some evidence has been given to support it in fact, much of the payment of the pension, some of the collection of tithes by the land-owner, an issue ought to be directed to try it. And if it should be found by the jury, that the pension is payable in discharge of tithes, but they should find against the second branch of the prescription, *viz.* that the land-owner has a right to take the tithes, then such finding may be indorsed upon the *postea*.

Issues were accordingly directed.

“ First, whether she, the said *Elizabeth Gwynn*, and all those whose estate she hath in the three several tenements or farms in the pleadings of this cause mentioned, called by the several names respectively of *Breebua*, *Llystin*, and *Maes y Grove*, situate, lying, and being within the chapelry of *St. Michael in Roscorney* in the county of *Caermarthen*, and in such part of a certain ancient capital tenement and demesne lands called *Forest*, as lieth within the said chapelry, hath and have, from time whereof the memory of man is not to the contrary, paid to the rector of the said rectory of *Llanlley*, otherwise *Llanlloney*, and the chapelry of *St. Michael in Roscorney* aforesaid, for the time being, the sum of four pounds yearly, as a pension or payment in satisfaction of all tithes arising or increasing upon the said three tenements or farms, and upon so much of the said forest demesne lands as is situate within the said chapelry.”

“ Secondly, whether she the said *Elizabeth Gwynn*, and all those whose estate she hath in the said three several tenements or farms, and in the said part of the said forest demesne lands, hath and have, from the time whereof the memory of man is not to the con-

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trary, been used to have, and ought to have, in respect of the said pension or payment so paid to the said rector for the time being, the tithes or tenth part of all corn, grain, hay, and other tithable matters arising on the said three tenements or farms, and on so much of the said forest demesne lands as are situate within the said chapelry."

The defendant *Gwynn* to be plaintiff at law; the issues to be tried by a special jury; and the judge to indorse, &c. &c.

The said issues were accordingly tried, and the jurors found for the plaintiff at law.

The court, on the 5th of *July* 1779, ordered the bill to be dismissed with costs at law only; the plaintiff in equity to deduct thereout the arrears of the pension of four pounds a year.

M. 19 Geo. III. A. D. 1778. In Canc.

Devie v. Lord Brownlow and others.

THE plaintiff was vicar of the church of *Stanground* with *Farcet* in the county of *Huntingdon*, (into which he was inducted in *July* 1766), and the defendant lord *Brownlow* was impropriate rector of the same church. The rectory impropriate of the same church was formerly part of the possession of the abbey of *Thorney*, and by endowment of 11 *April* 1402 the abbot and convent of the said abbey granted to the vicar of the said church, all tithes, tenths, oblations, and offerings whatsoever belonging to the said church, except the tithe of corn, hay, wool, lambs, and calves. At the time of the dissolution of the said abbey, the vicar, by virtue of a further endowment by the said abbot and convent (supposed to have been made 22 *H.* 6.) was endowed with, and enjoyed a portion of one third of tithe-corn, arising within the limits or hamlet of *Farcet*, which is a separate vill, but parcel of the said parish of *Stanground*. Sir *Walter Mildmay* knight, chancellor of the Exchequer (to whom queen *Elizabeth* had then lately granted the impropriate rectory of *Stanground*) by indenture, dated 24th *October* 30 *Eliz.* granted to the master, fellows, and scholars of *Emanuel College* in *Cambridge* (which sir *Walter* had founded, and to which he gave the advowson of the said vicarage), and their successors for ever, in trust for the vicar of the said parish, amongst other things, "all the tithes of wool, lamb, and calf, arising within the parishes, towns, and hamlets of *Stanground* and *Farcet*, (except the tithes of wool, lamb,

lamb, and calf, arising from the demesne lands and tenements of the manor of *Stanground*, then in the occupation of *Henry Parkinson*, or his assigns); and after taking notice that the vicar then had only one third part of the tithe-corn in *Farcet* (the other two thirds thereof belonging to him the said sir *Walter Mildmay*, as improprator) he granted to the said master, fellows, and scholars, one fourth of his two third parts of the said tithe-corn; so that the said vicar should thenceforth have and enjoy one full moiety of all the tithe-corn arising in the said hamlet of *Farcet*. By a further indenture, dated 11th April 31 Eliz. the said sir *Walter Mildmay* conveyed to the master, fellows, and scholars of the said college, and their successors, in trust for the said vicar, the other moiety of the tithes of corn in *Farcet*.

By virtue of these several endowments and grants, the plaintiff, as vicar of the said church, claimed, 1. The tithe of corn, and all other tithes (except hay) throughout the hamlet of *Farcet*. 2. The tithe of wool, lambs, and calves, and all other the small tithes throughout the vill or township of *Stanground* (except the tithe of wool, lamb, and calf of the manor farm or demesne of *Stanground*, called the *Burified*, formerly occupied by *Henry Parkinson* and his assigns).

Farcet, though united as a parish with *Stanground* under one church, is, in all other respects, distinct from it, both as a manor and a township. The town (which has a chapel of ease) is situate at the distance of upwards of a mile from that of *Stanground*, has a separate parish, and civil officers; and the manor is, in all respects, distinct from and independent of that of *Stanground*. The parish borders upon, and a large proportion of the lands belonging to the two townships extend into the great level of the fens called *Bedford Level*, which, till the improvements thereof, by drainage and inclosure in the reign of Car. 1. & 2. lay in a state of inundation, during the greater part of the year, and wholly unproductive (except a species of coarse grass and hay upon some particular spots) but in consequence of the drainage, &c. became, and has since continued fit for culture, and produced corn, and other tithable matters. Within the parish of *Stanground*, and adjacent to the township and common field lands of *Farcet*, lies a large tract of fen land, distinguished and bounded as after-mentioned, and containing, by estimation, 3,360 acres, or thereabouts, anciently and still known by the denomination of "*Farcet Fen*," and reputed to be parcel of the manor and hamlet of *Farcet*. The remainder of the fen lands within

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The tract called *Farcet Fen* is bounded as follow, viz. Towards the north-west, by the common lands, in the vill of *Farcet*, from which it is divided by a river, called *Farcet Water*. Towards the north, by lands in *Stanground*, called *Horsey Grounds*. Towards the north-east, by lands in *Whittlesey*, called *Whittlesey King's Delf*, from which it is divided by a dyke, called *Hockey* or *Oakey Dyke*. Towards the south-east, by fen lands in *Ramsay*, called *Middlemore*, from whence it is divided by a dyke, called *Small Dyke*. Towards the south, by the lake of water, called *Whittlesey Meer*; and to the south-west, upon lands in *Yaxley*, from which it is divided by a dyke or stream, called *Conquest Load*.

Anciently, and long before the general drainage of the fens took place, certain parcels of land had been fenced off from the residue of *Farcet Fen*, and held in severalty for the purpose of mowing hay; the remainder (when not covered with water) as also the inclosed parcels after having been mowed, were used as an open common. The largest of the meadows thus inclosed, which lay on the north-east side next *Oakley Dyke*, and contained 500 acres, was (and is still) called *Farcet King's Delf*, and eight roods, and was subdivided into small parcels (containing about four acres a-piece) called *Doles*, which were allotted to, and held in severalty by sundry inhabitants of *Stanground* and *Farcet*, (probably) in respect of their rights of common in the fen. Another of the said meadows, lying on the north-west side, and containing about thirty acres, was (and is still) called *Milby*. Another of the said meadows, lying on the same side, and adjacent to the last, containing about forty acres, was (and is still) called *New Mead*. Sundry other small parcels, inclosed in like manner, lying on the same side, were (and are now) called by the name of the *Pingles*. At the southern extremity of the fen adjoining to *Whittlesey Meer*, a cottage called *Beales Cote*, was anciently built, and ten acres of land were inclosed to and have ever since been held in severalty with it.

The abbot of *Thorney*, to whom both the manors of *Stanground* and *Farcet* belonged, held in severalty (at the time of the dissolution) another inclosed parcel, containing about 140 acres, (lying on the south-west side of the fen next *Conquest Load*) called *Conquest Close*, extending from *Fowle Lake* in *Whittlesey Meer* to *Farcet Water*. The remainder of the fen was, till the period after-mentioned, an open common, into which the tenants and inhabitants

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in sundry neighbouring and some distant manors (which belonged to the same abbey) had a right, by custom, of turning their commonable cattle, making a yearly acknowledgement for the same to the lords of the manor of *Farcet*. 1778.

In 10 *Eliz.* the said sir *Walter Mildmay*, to whom the manor of *Farcet* had been then granted in fee (and who was then lessee of the crown for sixty years of the manor of *Stanground*) came to an agreement with the commoners in the said fens, whereby he gave up his right of common and herbage therein, in consideration of being permitted to inclose and hold in severalty to him and his heirs 400 acres of the said fen adjoining to the said parcel (formerly inclosed by the abbot) called *Conquest Close*, and such 400 acres were in consequence of such agreement inclosed, and have been ever since held in severalty with and as parcel of the manor of *Farcet*.

The remainder of the fen lay open waste, till the drainage of the fens took place in the reign of *Charles the First*. By the terms of their undertaking, the adventurers for the drainage were to have 95,000 acres (being the proportion of one third of the whole level) set out to them from all the lands common and several within the level, and the same were allotted to them accordingly by a law of sewers, (since called the *Saint Ive's Law*), made on 12 *October* 30th *Car. 1.* whereby 940 acres, further part of the then common fen of *Farcet*, situate on the southern side next *Whittlesey Meer* and *Ramsay fen*, and 162 acres out of *Conquest Close* and lands, and three acres, one rood, ten perches, out of the lands belonging to *Beales Cote*, were set out, and afterwards inclosed, and held in severalty, as the full proportion of the adventurers of the whole of *Farcet Fen*, including the said meadows of *King's Delf*, *Milby*, *New Mead*, and the *Pingles*, out of which no allotments were taken.

In the year 1682, the remainder of the said fen, which contained 1,300 acres, was, by virtue of statute 15 *Car. 2. c. 17.* intituled, "An act for settling the drainage of the great level of the fens called *Bedford Level*," divided and allotted to the several persons having right of soil and common therein, in proportion to such their respective rights, and afterwards inclosed and held in severalty by them; and thirty-five acres were on that occasion allotted to *William Brownlow esq.* as lord of the manor of *Farcet*, and (as such) owner of the soil of the said fen, in lieu of his seignory.

Soon after the commencement of the drainage, when a prospect opened of the fen lands becoming productive, the right of tithes therein became an object of attention and dispute, and the inclosed fen

1778. fen lands in *Stanground* and *Farcet*, then held in severalty, being first improved and rendered capable of yielding tithable matters, the vicar of *Stanground*, some time before the year 1640, asserted his claim to such tithes of those lands, as by his endowments and grants he was entitled to. The then impropriator, *Mildmay* earl of *Wiltmoreland*, at first resisted the vicar's demand; but after a suit commenced by the vicar in the ecclesiastical court, entered into a compromise, and by agreement, made in the year 1640, consented to allow him twenty-five pounds a year in lieu of and as a composition for the tithes of the said inclosed fen-grounds, which payment hath been continued to be made by the succeeding impropriators to the successive vicars, from that time down to *Lady-day* 1773. Sundry disputes afterwards arose respecting the tithes of the 940 acres, allotted to the adventurers, and the 1,300 acres, allotted to the commoners, as well between the impropriator and the owners, as between the impropriator and the vicar of *Stanground*, and several suits were commenced, and some of them brought to trial in consequence thereof; but before any final decision of the right took place, these disputes also terminated in the year 1688, in a compromise between the impropriator and vicar, the former consenting to accept, and the latter to grant, a lease of such tithes in the said lands as the vicar was entitled to, at the rent of fifty pounds a year, which hath been continued to be regularly paid under that and subsequent leases by the succeeding impropriators, and accepted by the successive vicars from thence to *Lady-day* 1773.

The first lease bears date 30 *May* 1688, and was granted by *Joshua Ratcliff*, then vicar, to *William Brownlow* esq. then impropriator, for the term of five years; a further lease, dated 26th *May* 1691, on the same terms, was granted by *Samuel Doughty* clerk, then vicar, to the said *William Brownlow*, for the term of five years; and a third lease, bearing date 26th *May* 1751, was granted by *William Whitehead* clerk, then vicar, to sir *John Brownlow* bart. lord viscount *Tyrconnel*, then impropriator, for fifteen years.

The payments of twenty-five pounds, and fifty pounds a year, bearing no reasonable proportion to the value of the tithes in lieu whereof they were paid, and the plaintiff conceiving himself justly entitled to receive those tithes in kind, or a fair composition for the value thereof, gave due notice to the defendant, that he would not accept the payments in question after *Lady-day* 1773, but would thenceforward take the tithes in kind, and the defendant

dant lord *Brownlow* disputing his title to, and withholding the payment of such tithes, the plaintiff, on 21st *January* 1774, filed his bill in the court of Chancery against the said lord *Brownlow*, and against *Thomas Mewburn*, *George Richardson*, *Sanderfon Henrey*, *William Blackwell*, *Ralph Speechley* the younger, *David Bowker*, *James Arnold*, and *John Kingston*, (occupiers of lands and tithes in *Farcet Fen*, and of inclosed fen lands in *Stanground*, as tenants to the said lord *Brownlow*), and against *William Chapman*, *Robert Johnson*, and *Daniel Plummer*, (other occupiers of land in *Farcet Fen*, as tenants to sir *Samson Gideon*), and against the master, fellows, and scholars of *Emanuel College, Cambridge*, stating (amongst other things) that by virtue of the said several endowments and grants, or by virtue of some prescription from time immemorial, or some usage, the plaintiff, as vicar of the said church, was entitled to all and singular the tithes of wool, lambs, calves, corn, grain, and hay (except the tithes of hay of the meadows of *King's Delf*, *Milby*, and *New Mead*) arising within the said village, town, and hamlet of *Farcet*, and to all tithes of wool and lambs (except the tithes of wool and lambs of the *Bure-fled* or manor-house) throughout the hamlet of *Stanground*, and to *Easter* dues and offerings and the tithes of wood and reed, and all other small and vicarial tithes whatsoever, arising within the said parish of *Stanground*, and the several manors, villages, and hamlets of *Stanground* and *Farcet* aforesaid, and the tithable places thereof; and charging, that the said defendant *Thomas Mewburn*, and the other defendants the occupiers, had, from and since *Lady-day* 1773, severally holden and occupied sundry lands in the several parts of *Farcet Fen*, and in the fen lands and inclosed grounds of *Stanground* therein specified, and had taken all the tithes thereof and of other lands therein mentioned, which were of right payable and belonged to the plaintiff, and refused to pay or account to him for the same; and that the defendant, lord *Brownlow*, as lay rector or impropiator of the said church, disputed the plaintiff's title to the said tithes; and that the said master, fellows, and scholars refused to join with the plaintiff in the said suit, or to assist him in the recovery of the said tithes; and therefore praying that the said defendants, the occupiers, might account with and make satisfaction to the plaintiff for the single value of all and every the said tithes so by them withheld or subtracted; and that the plaintiff's right and title, as vicar of the said church, to the said tithes,

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might be established against all claims and demands of the defendant lord *Brownlow*, as lay rector and impropriator thereof, and that the said defendants the master, fellows, and scholars might be decreed to act as trustees for the plaintiff's benefit, and for general relief.

The defendant, lord *Brownlow*, on 18th *June* 1774, put in a plea in bar to the discovery and account sought by the bill, that he was impropriator of the rectory of the said church, and therefore not bound to make such discovery.

The said defendant at the same time put in his answer to the remainder of the bill, and thereby insisted, that the plaintiff had no title against him, as impropriator, to any tithes arising within the said parish, over and besides such as the plaintiff had then before taken and enjoyed, and not admitting, but on the contrary disputing, the plaintiff's title (and reserving to himself such right as he should be able to make out as impropriator against the plaintiff) as vicar, to such tithes, as he had since his institution and induction taken without dispute or controversy.

The said defendant, *Thomas Newburn*, and the other defendants the occupiers, put in similar pleas in bar to the discovery prayed by the bill, and filed answers to the remainder of the bill 8th *July* 1774.

The said pleas were argued before the Lord Chancellor, 19th *December* 1774, and over-ruled, and the plaintiff having taken exceptions to the said answers, and afterwards amended his bill, the said defendants were ordered to answer the exceptions and amendments together.

The said defendants accordingly, in *Hilary* vacation 1776, put in their further answers to the original and amended bill, and the answer of the defendant lord *Brownlow* being again excepted to and reported insufficient, the said defendant, 6th *March* 1777, put in a further answer to the said amended bill.

The said defendant by his said answer disputed the existence and validity as well of the ancient endowments, as of the grants of sir *William Mildmay*, and put the plaintiff to the proof of his title against the said defendant lord *Brownlow*, as impropriator, not only to the tithes really in dispute, but to all the tithes belonging or which had uninterruptedly been enjoyed as parcel of the vicarage.

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The defendants, the occupiers, by their further answer discovered the lands in their respective tenures, and rendered an account of the tithes arisen therefrom since *Lady-day 1773*.

The master, fellows, and scholars of *Emanuel College* put in their answer, stating the grants of sir *Walter Mildmay*, and submitting to produce them in support of the plaintiff's title.

The plaintiff having replied to the answers, and entered into proofs in support of his claims, the cause came on to be heard in *Michaelmas term 1778*, before the Lord Chancellour, and the defendant lord *Brownlow* then (as he had done before by his answers) set up his title as impropriator to all the tithes of the rectory, which could not be proved to have been legally granted or taken from it, and refused to admit that the plaintiff was entitled to any tithes whatsoever, but insisted on putting in issue the whole of his claims as well under the ancient endowments as under the grants; whereupon the court, on 5th *December 1778*, decreed, that the parties should proceed to a trial at law, at the assizes to be holden in the county of *Huntingdon*, by a special jury, on several issues, which (as afterwards settled by the Master) were as follows, *viz.*

1. Whether the plaintiff, as vicar of the parish of *Stanground cum Farcet*, was entitled by endowment, prescription, grant, or otherwise, to all other tithes, except the tithes of corn, grain, hay, wool, lambs, and calves, growing, renewing, or accruing in, upon, or out of the lands in the said parish, which had been in the occupation of the defendants to the bill respectively, since *Lady-day 1773*.

2. Whether the plaintiff, as vicar as aforesaid, or the master, fellows, and scholars of *Emanuel College*, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to the tithes of wool, lambs, and calves, growing, renewing, or accruing in, upon, or out of the lands which had been in the occupation of the several other defendants respectively at any time since *Lady-day 1773*.

3. Whether the lands called *King's Delf*, *Eight Roods*, *Conquest Lands*, *New Meadow*, *Milby*, the *Pingles Berkleys*, or the *Adventurers Lands*, and *Farcet Common Fen*, out of which the plaintiff by his bill sought tithes, lay within the common of *Farcet*.

4. Whether the plaintiff, as vicar as aforesaid, or the said master, fellows, and scholars, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to the tithes of corn and grain, growing, renewing, or accruing in, upon, or out of the lands

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lands in the occupation of the other defendants to the said bill respectively in the hamlet of *Farcet*.

5. Whether the plaintiff, as vicar as aforesaid, was entitled by endowment, prescription, grant, or otherwise, to one third part of the tithes mentioned in the last issue.

6. Whether the master, fellows, and scholars of *Emanuel College, Cambridge*, were entitled by endowment, prescription, grant or otherwise, to two third parts of the same tithes.

The said issues came on to be tried on 29th July 1780 at the assizes at *Huntingdon* before Mr. Justice *Willes* and a full special jury, five of whom had taken a previous view (under the rule of the court of King's Bench) of the lands in question, and after a trial, which lasted two entire days, the jury returned the following verdicts on the several issues, viz.

On the first issue for the plaintiff generally.

On the second issue for the plaintiff, (except as to the lands called *Berrystead Farm*.)

On the third issue for the plaintiff, (except sixty doles, part of the lands called *King's Delf*, which the jury found to be within the hamlet of *Stanground*.)

On the fourth, fifth, and sixth issues for the plaintiff generally.

In *Michaelmas* term 1780, the defendants applied to the court of Chancery that the above verdict might be set aside, as contrary to law and also to evidence, and that a new trial might be had of the issues; and the matter of the said motion being argued on several days, and for the last time on 5th March 1781, stood over for judgement; and on 28th May 1782, the Lord Chancellour rejected the application, and refused to make an order for a new trial of the said issues, or any of them.

From this decision the defendants appealed to the House of Lords, upon the following grounds:

The verdict is contrary to the truth and justice of the case in many material parts, and, as to some of them, founded upon the misdirection of the judge in matters of law.

1. With respect to the respondent's right to the tithe of corn, it appears on his own shewing, by his title under the last of sir *Walter Mildmay's* grants, that his right was to tithe-corn, in the hamlet of *Farcet*, with an exception (and that too very extensive); but the jury have found his right to tithe-corn in that hamlet, without any exception whatsoever.

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The injustice of the verdict in this material part of the case is so apparent, that the vicar now (for the first time) resorts to the extraordinary expedient of attempting to maintain, that the exception ought to be expunged out of his own title deed, as being inserted by mistake of the drawer. This never was thought of till near 200 years after the date of the deed, and cannot be worthy of an answer, after the admission of the exception in the words of it, both by the college and the vicar, recorded in their answers in Chancery in 1685, which were read at the trial; and the only question then was, as to the quantity of lands comprized in the exception.

2. The jury have found, that all the lands in the third issue, except sixty doles of *King's Delph*, lie in the hamlet of *Farcet*, and have found, on other issues, that the vicar is entitled to tithes of corn throughout the hamlet of *Farcet*; so that as the verdict now stands, the vicar is found to have a right to tithe-corn over all the lands in the third issue, except the sixty doles in the *King's Delph*; whereas it was not proved, that all those lands are in the hamlet of *Farcet*; and as *Stanground* is the mother church, the presumption is, that lands in that parish are not within the chapelry or hamlet, unless proved so. But the judge not only admitted modern evidence to prove lands to lie in the hamlet, which by the true construction of the statutes 15 *Car. 2. c. 17. s. 6. 52.* and 17 *Geo. 2. c. 37.* ought not to have been admitted, but also allowed various papers not signed by any person, as evidence, though the same was opposed by the appellant's counsel. And with respect to *Farcet Fen*, it appeared by the recital in the last of the vicar's leases that only part of it lies in the hamlet of *Farcet*, and yet the jury have found the whole to lie there, and have thereby rejected that part of the recital, notwithstanding other parts of that recital were ruled by the judge to be decisive, as to other matters against the appellant. And it was clearly proved by the crown receiver's accounts, and by royal grants of *Stanground* manor, and also by old depositions, that *Farcet Fen* was part of the demesnes of the manor of *Stanground*, and yielded some profit, even before the drainage, to the lord of that manor, notwithstanding it was subject to right of common; and therefore such part of it as lies in the hamlet of *Farcet*, is within the exception in sir *Walter Mildmay's* last grant; and by the common law the master and commons of every manor, whether they afford profits to the lord or not, are part of his demesnes; but the judge was of a contrary opinion, and declared to the jury, that *Farcet Fen* was not

1778. part of the demesnes, because not reserved (as he said) for the lord's use; which was a misdirection in point of law, and also in matter of fact; and not only *Farcet Fen*, but such other lands in this issue, except the old *Conquest Close* and some of the eight roods, and some few other small pieces, which were proved to be in the manor of *Farcet*, appeared by evidence of enjoyment, and acts of ownership by the lords of *Stanground*, and by reputation, and otherwise, either to be part of the demesne lands of *Stanground* or else to be part of the other lands in the exception; and therefore as to all these the verdict, as found, without any exception, is unjust, even supposing the right to the tithe-corn in question was now open to litigation. But

3. The right to tithe-corn in most of the lands, in the third issue, has been often contested, and sometimes decided by verdict in favour of the rector, and at other times ended in nonsuit of the college; which nonsuits by old depositions and otherwise appear to have been on the merits, without a single instance, till now, of any suit wherein the rector failed, or wherein the vicar or college, or any other opposing the rector, ever succeeded.

The rectors have ever since enjoyed the corn-tithe of these lands, without any demand by the vicars; for as to part, they were not included in any of the leases made by the vicars to the rectors; and as to those lands, the tithes of which were included therein, the leases are in such terms as do not extend, nor could be meant to extend, to any but small tithes, as the vicar was entitled to. And as to the payment of twenty-five pounds a year, that could not be for the corn-tithes in litigation, because it is admitted to have commenced before, and to have continued during all former litigations, as well as ever since; and besides, it is too low for a composition commencing any thing like so late as 1640, for all the tithes now claimed by the vicar over so extensive tracts of land. And therefore it is submitted, that the claim of the respondent, as to tithe-corn of any of those lands, is concluded and barred by former determinations, and constant enjoyment under them. But, supposing the length of time not conclusive against the respondent, then by the same rule it cannot be so against the appellant; consequently, the validity of the grants is still open to all legal objections, and several such objections were insisted on at the trial, as proper to be argued, if the case was not concluded; but the judge would not enter into any consideration about them.

4. That part of the parish, which lies in *Cambridgeshire*, ought to have been excepted in the verdict on all the issues.

Because

Bécause the only written evidence on the first issue was not an original, but an entry of the substance or import of an endowment, which made it necessary, in support of the vicar's title, to prove enjoyment under it, which he did, by two or three living witnesses; who had collected small tithes. But all of them agreed that no tithes of any kind whatever had been collected or demanded by, or where due to the vicar for that part of the parish which lies in *Cambridgehire*; and both *fir Walter Mildmay's* grants are in such terms; as, by legal construction, do not extend out of the county of *Huntingdon*; and the construction is confined by usage; and therefore the not excepting that part of the parish which lies in *Cambridge-shire* out of the verdict on all the issues; is manifestly unjust, by extending the vicar's claims over large tracts of lands, of which there was no enjoyment since the creation of the vicarage in any of the respondents predecessors.

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5. It appeared at the trial, by the testimony of living witnesses, and by the old depositions, that *New Meadow* is discharged from all tithes, in consideration of a tithe-acre immemorially enjoyed by the rectors in lieu of the tithes thereof; and as the locality of that meadow makes part of the third issue, and it is found to be in the hamlet of *Farcet*, therefore the same and the tithe-acre ought to have been excepted in the verdict on all the issues.

6. The construction of the words "*garbarum cujuscunque generis*" and "*bladorum sœnique*" in the exception of tithes in the endowment of 1402, was misunderstood at the trial. It was then and is now humbly insisted, that by the legal import of the word *garba*; tithes of wood, as well as of corn and grain, are included, unless restrained by usage, or the context; but in this case there was no instance proved of payment of tithe-wood to any vicar; and the context, so far from restraining the sense of the word, plainly shews it was intended in the largest sense; yet, as the verdict now stands, the vicar is entitled to tithe-wood contrary to an established principle of law, "that a vicar cannot be entitled to any particular species of tithe, otherwise than by endowment or prescription, and that all others by law belong to the rector." The respondent's bill is to establish his right as vicar against the appellant the rector, to all tithes claimed to be due to him by the bill, of which tithe-wood is one; and therefore, whether there is now any titlable wood in the parish or not, or whether the charge in the bill be true or not, that *Farcet Fen* was anciently part of the king's forests, and known by the name of *Farsquid Ferry*, yet as the bill is to establish

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the vicar's right to all the tithes mentioned in his bill, the right to tithe-wood ought to have been excepted out of the verdict on the first issue:

7. The judge neglected taking any notice of the word *bladorum* in the exception, though it was at the trial, and is now humbly submitted, from the obvious import of it, as well as from the context, to mean tithe of grafs or corn depastured by cattle, or cut green, and before ripe, and given to cattle; which includes agistment-tithe, and also tithes of grafs and of corn, vetches, tares, and other grain or pulse, when cut green and given to cattle; and therefore these species of tithe ought also to have been excepted out of the verdict on the first issue.

8. The respondent's right to tithe-corn in any particular part of the parish depends upon two facts; the one, that such part lies within the hamlet of *Farcet*; the other, that it is not part of the demesnes of the manor of *Stanground*, or of the other excepted lands. The respondent found it impossible to support this claim over the lands in the third issue, without assuming a fact (which he had no right to do without proof) that the manor and hamlet of *Farcet* are co-extensive. But in this case, there was not only no proof at all of it, but clear proof to the contrary, besides demonstration on the face of the respondent's own title deed, which expressly excepts demesne lands of the manor of *Stanground* out of the grants of tithes of lands in *Farcet*. This was urged to the judge by the appellant's counsel who requested him to take notice of it to the jury, which he did not, but suffered the evidence, as to any piece of land being in the hamlet, to be evidence, that it was in the manor and so on the reverse.

In answer to these reasons urged by the defendants, the plaintiff, the respondent, detailed the evidence produced at the trial.

State of the evidence produced by the Respondant on the trial of the issues.

In support of his case under the first and fifth issues, he produced

1. An endowment registered in the old register of the bishop of *Lincoln*; preserved amongst the archives of the diocese, in the registry of *Lincoln*; this endowment is dated 11 April 1402, wherein, after assigning a mansion house, and thirteen acres of land in *Stanground*, to the vicar, the abbot and convent of *Thorney* make the following grant, viz. "*Item habebit dictus vicarius, qui pro tempore fuerit, portione sua, in perpetuum, omnes fructus redditus et proventus, decimasque et oblationes universas ad eandem ecclesiam qualitercumque provenientes,*

venientes, et pertinentes; decimis garbarum cujuscunque generis, bladorum, fœniquæ ac luncæ, et agnorum et vitulorum (quoties vitulus decimus in specie fuerit solvendus) ad eandem ecclesiam qualitercunque provenientes, necnon glebâ et mansor rectoriæ ecclesiæ duntaxat exceptis; quæ ad religiosos hucque ut ipsius ecclesiæ proprietarios, in perpetuum pertinébunt salvo habitatione vicarie et scitu ejusdem superius designat."

2. A duplicate or ancient copy of the same endowment, found in the registry of the bishop of Lincoln at *Rugden* in *Huntingdonshire*, on which appeared an indorsement in the following words, "*viz. Ecclesia sancti Johannis Baptiste de Stanground, appropriet. taxatur ad xxl. inde decimæ viii l.*" vicarius ecclesiæ parochialis de *Stanground*, percipiet omnes decimas præterquam decimas garbar. granorum et fœni vitulorum et agnorum per compositionem et ordinationem decani *Lincoln*: tamen nuper dominus *Johannes Kirketon* abbas anno regni *Hen. 6. 22do. augmentavit portionem dictæ vicariæ conferendo eidem tertiam garbum decimis granorum in campis de Farthed ut de cetero nullatenus annumeret."*

3. A passage from the appellant's second answer, admitting that the yearly sum of twenty-five pounds had been paid by the lord of the manors of *Stanground* and *Farcet*, for the time being, and accepted by the vicars for the time being, ever since the year 1640 up to *Lady-day* 1773, but denying the defendant's knowledge on what account the payment was made.

4. The respondent proved by *Robert Bellamy* a living witness, the receipt, by the present vicar, of the small tithes throughout the parish of *Stanground*, except of the inclosed fen lands, lying in that part of the parish which is in *Cambridgeshire*.

Upon the second, fourth, fifth, and sixth issues he produced,

First, an indenture dated 24th October 30 Eliz. between sir *Walter Mildmay* knight, chancellor of the Exchequer, &c. of the one part; and the master, fellows, and scholars of *Emanuel College*, of the other part; whereby, after taking notice (amongst other things) that the provision for the vicar of *Stanground* was not sufficient for his maintenance, and that sir *Walter*, being proprietor of the rectory and patron of the vicarage, was minded to make such provision for him as is therein mentioned; the said sir *Walter*, in consideration thereof, and for other the considerations therein mentioned, granted, bargained, and sold to the said master, fellows, and scholars, 1. The parsonage house and a close called *Parson's Croft*, and the glebe lands thereunto belonging; and 2. "All those tithes of wool, lamb, and calf, yearly and from time to time coming,

1778. coming, arising, and renewing within the parish, town, and hamlets of *Stanground* aforesaid and *Farcet* in the said county of *Huntingdon* (except and always reserving to the said sir *Walter Mildmay*, his heirs and assigns, all and all manner of tithes of wool, lamb, and calf, yearly, and from time to time coming, arising, happening, or growing out of, for or by reason of the demesne lands and tenements of the said manor of *Stanground*, then in the occupation of *Henry Parkinson* or his assigns); and after reciting, that the then vicar, and his predecessors, had but only one third part of the tithe of corn in *Farcet*, the whole in three parts being divided, and the proprietor or owner of the said parsonage of *Stanground* aforesaid, the other two third parts of the said tithe-corn (of which two third parts the said sir *Walter* was seised in his demesne as of fee, as part of the said parsonage of *Stanground*), the said sir *Walter*, for the considerations aforesaid, granted and confirmed unto the said master, fellows, and scholars, one fourth of all his said two third parts of all the said tithe-corn, which from time to time should be coming and renewing within the said town, fields, or hamlet of *Farcet* aforesaid (being part of the said rectory of *Stanground*), the which fourth part of the said two third parts, together with the said other third part of the said tithe-corn there, which the vicar of *Stanground* then had and enjoyed, would amount together to a full moiety of all the tithe-corn renewing in the said town, fields, and hamlet of *Farcet* aforesaid, and growing due to the parsonage or vicarage of *Stanground* aforesaid, in such sort as whereas the then vicar and his predecessors had but one third part of the said tithe-corn in *Farcet* aforesaid, the said master, fellows, and scholars, and their successors, and the said vicar and his successors, should have (their portions being laid out or taken together) one moiety of all the said tithe-corn in *Farcet* aforesaid. And the said sir *Walter Mildmay* also granted to the said master, fellows, and scholars of *Emanuel College*, 3. All that the advowson, presentation, and rights of patronage of the vicarage of *Stanground* aforesaid (except and always reserving to the said sir *Walter* and his heirs or assigns, all the rents and yearly profits reserved and limited to be paid for the said tithe-corn, upon one lease for term of years, therefore made of the said tithes, and other things, which the said *Parkinson* then had); to hold unto, and to the use of the said master, fellows, and scholars, and their successors for ever.

The college covenant with *sir Walter* to present a fit and able clerk, and to permit and aid him in the enjoyment of the premises granted in trust for him.

Secondly, A deed-poll under the hand and seal of the said *sir Walter Mildmay*, dated 9th *April*, 31 *Eliz.* whereby, after reciting that he had by indenture, dated 26th *October* 30 *Eliz.* settled the rectory of *Stanground*, with all the tithes and hereditaments thereunto belonging (except all such lands, tenements, tithes, advowson, and hereditaments in *Stanground* aforelaid and in *Farcet*, which he had granted to the master, fellows, and scholars of *Emanuel College*) to certain uses therein expressed, with power of revocation, the said *sir Walter* resumes to himself, and revokes, and declares void the said settlement, as concerning the tithes of wool, lamb, calf, corn, and grain, within the town or hamlet of *Farcet*, and the fields and limits thereof, or any of them, and all sums of money, and other profits due or payable concerning the same, then or late parcel of the rectory of *Stanground* (other than the tithes of wool, lamb, calf, corn, grain, and other things arising from the demesne lands and tenements, of the manor of *Stanground*, and other lands and tenements of the said *sir Walter*, then or late in the tenure of *Henry Parkinson*, *Michael Beale*, *John White*, and *Thomas Smith*, or any of them, by lease or at will).

Thirdly, An indenture dated 11th *April* 31 *Eliz.* between the said *sir Walter Mildmay* of the one part, and the said master, fellows, and scholars, of the other part, whereby, after reciting, that the said *sir Walter Mildmay* had erected the said college, and had also endowed the same with divers lands, tenements, tithes and hereditaments, and other things for the maintenance thereof, and yet having great care and zeal for the establishment and continuance thereof, to the glory and honour of Almighty God, and setting forth his holy gospel by good and able preachers, and for the increase of living of and for the vicar of *Stanground* aforelaid, the said *sir Walter Mildmay*, for the considerations aforelaid, gave, granted, and confirmed unto the said master, fellows, and scholars,

“ All those the tithes of wool, lamb, calf, corn, and grain within the parish, town, or hamlet of *Farcet* (except and reserving to the said *sir Walter* and his heirs, all and all manner of tithes of wool, lamb, calf, corn, grain, and other things arising from the demesne lands of the manor of *Stanground*, and all other lands and tenements then or late in the tenure of *Henry Parkinson*, *Michael Beale*, *John White*, and *Thomas Smith*, or any of them, by lease or at will, not

1778. being copyhold; to hold to the said master, fellows, and scholars, and their successors for ever, upon trust, that they should perform the covenants therein after contained.

The college covenant, that they will at all times hereafter permit the vicar or *Stanground*, and his successors, to have, retain, and enjoy all and singular the premises in *Farcet* thereby granted without the interruption of the said college, and without any rent or service to them therefore to be yielded or done.

Evidence in support of the Respondent's case, under the third issue, viz. to prove the lands therein described to be situated within the banks of Farcet.

The manors of *Stanground* and *Farcet* both belonged to the abbot of *Thorney*, and upon the dissolution thereof, came to the crown; *Robert Smith*, who held the offices of bailiff and collector of the rents of both manors under the abbot, was continued in those offices by the court of augmentation, in which court his accounts were passed annually upon oath, and recorded.

Fifthly, An office copy of the roll of the said *Robert Smith's* first account of *Farcet*, for one year, ending at *Michaelmas* 32 H. 8, wherein, under the title of *Farcet* collection, he accounts as follows, viz.

Under the title of "Manor and demesnes of *Farcet*:"

For rents of assize of the free and customary tenants of the manor of <i>Farcet</i>	£. s. d. 25 6 3
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For the farm of a pasture, called <i>Conquest</i> , lying within the limits of <i>Farcet</i> , extending from the <i>Fowle Lake</i> to <i>Farcet Water</i> , from <i>Conquest Land End</i> to <i>Horsey Bridge</i> , from <i>Horsey Bridge</i> to <i>Whittlesea Dyke</i> , and from thence to a place called <i>Raven's Willow</i> , let on lease to <i>William Cooper</i> , at	5 14 8
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Under the title of "*Agistamenta de Farcet*."

For thirty-three shillings and fourpence, for the issues of a certain marsh called <i>Farcet Fen</i> , payable by different persons, for the agistment of their cattle, within the same marsh, for the space of one year,	1 13 4
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Under the title of "Fees and outgoings," he craves the following allowances:

His fee as bailiff and collector, under the deed of appointment of the abbot,	1 13 4
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For

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For his fee as surveyor of the marshes or fens of <i>Stanground</i> and <i>Farcet</i> granted him by deed of appointment by the abbot,	£.	s.	d.	1778.
			3	6
For stipend granted by the abbot, to <i>Charles Barlow</i> , clerk, for officiating in the chapel of <i>Farcet</i> , for his life,			4	13

There are two accounts for *Stanground*, for the same year, the one of the said *Robert Smith*, as bailiff of the manor and collector of the rents; the other of sir *Edmund Walsingham* knight, as farmer of the demesne and other lands, occupied by the abbot at the dissolution.

Sixthly, An office copy of *Smith's* account of *Stanground* manor for the same year; in which he accounts for the rents of assize, the rents of sundry farms in *Stanground*, in the occupation of himself and others, and the profits of the manor, but includes nothing arising from or belonging to *Farcet Fen*.

Seventhly, An office copy of the roll, containing the account of the said sir *Edmund Walsingham*, for the same year, as farmer of the demesnes rectory and other lands late in the hands of the abbot; wherein, under the head of "*Terræ dominicales de Stanground*," he accounts for the rents of the farm of the site of the manor, and sundry parcels of arable, meadow, and pasture in *Stanground*, and amongst other particulars,

"For twenty shillings for the farm of a certain marsh called *Farcet Farm*, in which farm the cattle of the tenants and inhabitants of *Stanground*, *Walter Newton*, *Haddon*, and *Woodstone*, of ancient custom, depasture, the surplus of which marsh is to let to farm as above."

Eighthly, An office copy of the roll, containing the said *Robert Smith's* account of the manor of *Farcet*, for the fourth year of *Edw. 6*.

In this account, under the head of "*Agistamenta de Farcet*," is contained as follows, "*De xxxiii. iv d. de exit cujusdam marisci vocat: Farcette Fenne levabil: de divers personis pro agistament: catal: suor: infra eundem marisc: deposcent: hoc anno debet hic non respondi eo quod dictus mariscus de Farcette fenne est parcell: ferme de Stanground dinis: Edmundo Walsingham, milit. per indentur pro termino annorum et per ipsum ad usum suum recept ibidem parcell ejusdem respons: est domino regi inde virtut, indentur: supra dict: ut ibidem appareat.*"

Ninthly,

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Ninthly, A parchment roll found amongst the papers produced by the appellant, pursuant to the decree, appearing to be a particular of the scite of the manor, rectory, and other lands in *Stanground*, for a lease thereof to be granted to sir *Edmund Walsingham*, made out by the officers of the court of augmentation, and subscribed by the judges thereof (of whom sir *Walter Mildmay* appears to be one), and properly a record belonging to the augmentation office.

This particular contains a description of the farm of the scite of the manor of *Stanground*, and the other lands comprised in sir *Edmund Walsingham's* first account, with separate rents annexed to each article, amongst which it enumerates,

£. s. d.

“ *Firma cuiusdam morisc ibidem vocat. Farceid Fenne in quo marisco catall. tenent. et inhabitant. de Stanground, Waternewton, et Woodstone sans nombre depast. surplusag. cujusquiam marisci spectat ad dominum regem ratione sursum reddit. nuper monasterii prædicti et valet communibus annis,* - I 0 0

Tenthly, Another parchment roll, found amongst the papers produced by the appellant, containing “A particular of the scite and demesne lands of the manor of *Stanground*.” It is subscribed by *Christopher Smith*, clerk of the pipe, and appears to be a record properly belonging to the pipe office; it is entitled, “Parcel of the possessions of the late monastery of *Thorney*, late assigned to our lady *Elizabeth*, now queen of *England*,” and under the head of the “scite and demesne lands of the manor of *Stanground*,” it contains a particular description of the farm of the scite of the manor, and the several parcels of lands belonging thereto. But no mention is made therein of *Farceid Fen*, or any profit arising therefrom; or a deduction of the twenty shillings (charged for it in the preceding particular) made from the rent.

The premises described are mentioned “to have been demised (among other things) to *Edmund Walsingham* knight, by letters patent, dated 20th August 2 *Edw. 6.* for twenty-one years, and to be then in the tenure of sir *Walter Mildmay*, at the rent of twelve pounds eight shillings.”

Examined by *Christopher Smith*, clerk of the pipe.

Eleventhly, An office copy of a record in the augmentation office, containing the particular made out for the grant of the manor of *Farceid* to sir *Walter Mildmay*, in fee, wherein,

Under

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Under the title of "manor of *Farcet*, in the county of *Huntingdon*," it describes the following articles :

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	£.	s.	d.
Rents of assize of the free and customary tenants	25	6	3
A farm of one pasture, and fishery called <i>Conquest</i> , lying at <i>Farcet Bridge</i> , between <i>Raven's Willow</i> and <i>Pockets Holme</i> , with the fishery and pasture in <i>Conquest Close</i> , together with all willows growing upon or round the said pasture, from <i>Fowle Lake</i> to <i>Farcet Water</i> , together with the profits of fishing and fowling within the same limits, with the fishing in the water of <i>Farcet</i> , from <i>Conquest Land End</i> to <i>Hersey Bridge</i> , and <i>Whittlesea Dyke</i> , and from thence to a place called <i>Raven's Willow</i> , let on lease to <i>William Cooper</i> , at the rent of			
	5	14	8
Profits of courts <i>communibus annis</i>	1	6	8

Under the head of reprisals, it states,

The fee of the bailiff <i>per annum</i>	1	13	4
Fee of the surveyor of the marches granted him for life	3	6	8
Stipend of the chaplain officiating in the chapel of <i>Farcet</i>	4	13	4

Twelfthly. Office copy of the grant from the crown of the manor of *Farcet* to sir *Walter Mildmay*, which bears date 30 June 7 *Edw. 6.* whereby the said manor of *Farcet*, and the farm described in the preceding particular, are granted to the said sir *Walter Mildmay* in fee.

Thirteenth. An office copy of a lease from the crown of the manor and rectory of *Stanground* to sir *Walter Mildmay*, bearing date 25 August 4 *Eliz.* from *Michaelmas* then next for sixty years, in which no mention is made of *Farcet* farm.

Fourteenth. An office copy of a decree of the dutchy court of *Lancaster*, made in *Easter term* 7 *Eliz.* in a cause between the queen and sir *Walter Mildmay*, in consequence of a dispute which had arisen between sir *Walter* and the queen's fishers, in the water called *Whittlesea Meer*, (which was parcel of the dutchy) relative to the boundary between *Farcet Fen* and the *Meer*.

This decree recites, that upon the certificate of the depositions taken before the commissioners, under a commission issuing out of the court for the inquiry of the true boundary and division "of a certain water of her majesty, called *Whittlesea Meer*, in the county of *Huntingdon*, from and between a pasture of sir *Walter Mildmay* knt. called *Farcet Fen* in the said county; as also, whether the said

Whittlesea

1778. *Whittlesea Meer* had at any time consumed, wasted, surrounded, worn away, or won any part of the said pasture," it did plainly appear, that the ancient and true boundaries dividing and separating the said *Whittlesea Meer* from the said pasture were two, the one called *Ayrlmynde's Hill*, and the other *Falce Tubbe*, within which boundaries the said water called *Whittlesea Meer*, had of late years consumed and worn away part of the said pasture; soasmuch therefore, as upon the deliberate hearing and perusing the said depositions and good advisement therein taken by her grace's chancellor and counsel of the said court, it appeared manifestly, that so much of the said water as was adjoining to the said pasture, and within the said boundaries, was the very right and inheritance of the said *Walter* as parcel of the said pasture.

It was therefore decreed and adjudged, that the said *Walter*, his heirs and assigns for ever, should and might lawfully have, hold and occupy, to his and their own proper use, so much of the said water, as was within and between the said two boundaries and the said pasture as parcel of the same pasture, with the fish and several fishing in the same water, at all times at his and their pleasure, without let, molestation, or intermeddling of any other person or persons.

Fifteenth. The respondent next read a passage from the appellant's second answer, wherein the appellant says, "that he has been informed, and believes, that at some time in or about 9 *Eliz.* an agreement was made, the said *Walter Mildmay* and some lords of the manors, who claimed a right of common in the said fen, and that by such agreement 400 acres of the said fen, adjoining to *Conquest Close*, were to be held in severalty by the said *Walter Mildmay*, his heirs and assigns, and believed the said 400 acres did, from the time of such agreement, become the separate estate of the said *Walter Mildmay*, his heirs and assigns.

Sixteenth. An office copy of the grant, dated 18th *March* 30 *Eliz.* from the queen to *Walter Mildmay*, of the reversion in fee, of the manor, advowson, and rectory of *Stangraund*, by the same description, as is contained in the said lease of 25th *August* 4 *Eliz.*

Seventeenth. A lease dated 16th *January* 1659, from *Oliver Saint John* to *John Bellamy*, of sundry parcels of the lands allotted out of *Farcet Fen* to the *Adventurers*, which are therein described to be situated in *Farcet*.

Eighteenth. An indenture dated 26th *May* 1691, from *Samuel Doughty*, vicar of *Stangraund*, to *William Brownlow* esq. lord of the

manor of *Stanground* and *Farcet*, and whereby the said *Samuel Doughty*, 1778.
 demises to the said *William Brownlow*,

“ All those tithes, of what nature or kind soever, due or belonging to him as vicar of the said church, in, out of, or for all that fen or fenny ground called or known by the name of *Farcet Fen*, containing in the whole, by estimation, 2240 acres, or thereabouts, part whereof having been anciently divided, was then called *Berkley's* lands, and contained by estimation 940 acres, or thereabouts, and the other part thereof, then lately inclosed or divided, containing by estimation 1300 acres, which fen is situated and being in *Stanground* aforesaid, and *Farcet*, or one of them :

“ To hold from *Lady-day* then last, for five years, if the said *Samuel Doughty* should so long live, at the yearly rent of fifty pounds, payable quarterly.”

Nineteenth. An indenture of lease, dated 26th *May* 1751, between *William Whitehead* clerk (vicar of *Stanground* aforesaid) of the one part, and the right honourable sir *John Brownlow*, lord viscount *Tyrconnel*, lord of the said manor, and impropriate rector of the said parish, of the other part ; whereby, after reciting sir *Walter Mildmay's* grant of the tithes of corn, grain, wool, lamb, and calf, in *Farcet*, and taking notice, that within the parish of *Stanground*, was a great farm, commonly called *Farcet Farm*, containing by estimation 2240 acres, viz. 940 acres, part thereof, called *Berkley's* or the *Adventurer's Lands*, which had been long before the year 1683, inclosed and divided, and the remaining 1300 acres belonging to the said manors or one of them, but which had been used time out of mind, until about the said year 1683, as a common of pasture, for the inhabitants of *Stanground* and *Farcet* aforesaid, in which also, the farmers and land-holders of the several towns of *Woodstone*, *Fletton*, *Haddon*, *Stibbington cum Sipson*, and *Water Newton*, in the said county of *Huntingdon*, claimed and enjoyed a right of common for the working of cattle levant and couchant, upon their respective tenements ; and reciting, that part of the said farm lay within the hamlet of *Farcet*, and that in or about the said year 1683, the said 1300 acres, or thereabouts, of the said farm, then lying in common as aforesaid, were by virtue of the statute made 15 *Car. 2. c. 17.* intituled, “ An act for settling the drainage of the great level of the fens, called *Bedford Level*,” divided into many parts, and allotted severally and respectively to the several persons having right of common therein. And reciting, that after such division, divers disputes arose, and suits were commenced and prosecuted
 between

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between *William Brownlow* esq. father of the said lord viscount *Tyrconnel*, (in whom by mesne conveyances the said manor and rectory were vested), and several of the vicars of *Stanground*, which suits and controversies were at length compromised by agreement, to grant to the said *William Brownlow* by *Joshua Ratcliffe* B. D. then vicar of *Stanground* aforesaid, a lease of all the tithes in the said fen, belonging to the said vicarage, by means of the said endowments, or otherwise howsoever, and by the said *William Brownlow* accepting thereof, in such manner as the same is thereafter granted and set forth. And reciting, that a lease was thereupon granted by the said *Joshua Ratcliffe* to the said *William Brownlow*, by indenture bearing date 30th May 1683, and after the death of the said *Joshua Ratcliffe*, another lease bearing date 26th May 1691, to the very same purpose and effect, as in the said former lease was made, from *Samuel Doughty* clerk, then vicar of *Stanground* aforesaid, to the said *William Brownlow*, for five years, if the said *Samuel Doughty* should so long live, and continue vicar of *Stanground*. And reciting, that the said composition and agreement was found to advantageous, both to the rector and vicar aforesaid, that although no lease in writing was executed between the parties since the expiration of the said last mentioned lease, yet the said agreement and composition had been duly observed by and between the succeeding rectors and vicars ever since, and the said rectors had duly paid the said reserved rent, and enjoyed and continued in the possession of the said tithes ever since, and still continued to do the same. And reciting, that it had been advised and found expedient, that the said lease should be renewed by the said *William Whitehead* the then vicar, to the said lord viscount *Tyrconnel*, the then rector, in manner aforesaid; it is witnessed, that the said *William Whitehead*, in confirmation of the said composition and agreement, and for and in consideration of the rent and covenants thereafter reserved, &c. and for other good causes, &c. granted, leased, and demised unto the said lord viscount *Tyrconnel*,

All those his tithes and tenths of what nature or kind soever, due or belonging to him the said *William Whitehead*, as vicar of the vicarage of *Stanground* aforesaid, in, out of, or for all that the said fen or fenny ground, called or known by the name of *Farcat Fen*, containing in the whole, by estimation, 2240 acres, or thereabouts (be the same more or less), part whereof having been anciently divided, was lately called or known by the name of *Barclay's Lands*, otherwise *Adventurer's Lands*, and containeth, by estimation, 940

acres, or thereabouts; and was then in the tenure or occupation of the right honourable the earl of *Lincoln*, or his under-tenants, and the other part thereof, first inclosed or divided about the year 1683, as aforesaid, containing by estimation 1300 acres, or thereabouts, as aforesaid; which said fen or fenny ground is situated and being in the parish of *Stanground*, and lies partly in the hamlet of *Farcet*, in the said county :

To hold the said tithes, tenths, and premises, to the said *John* lord viscount *Tyrconnel*, his executors, administrators, and assigns, from *Lady-day* then last, for the term of fifteen years, if the said *William Whitehead* should so long live, and continue vicar of *Stanground*, at the yearly rent of fifty pounds.

Copies of court-rolls of the manor of Farcet, found in the parish chest of Stanground.

Twentieth. Sir *Walter Mildmay*, lord. Admission of *Richard Olde*, dated 13th September, 5 & 6. Ph. & Mar. to one college, and two acres of land, with the appurtenances in *Farcet*; and one eight rood in *King's Delfe*, late in the tenure of *Thomas Astelyn*, on the surrender of *William Olde* his father.

Twenty-first. Sir *William Mildmay*, lord. Copy of licence, dated 16th October 30 Eliz. to *Thomas Andrew*, to let *William Pedley* his customary tenements in *Farcet*, viz. one messuage and one yard half land, with the appurtenances, two doles of meadow in *King's Delfe*, and half an acre of meadow in *Milby*, one barn called the *Forswath*, and seven lots of meadow lying in *South Meadow*, for the term of six years.

Twenty-second. Earl of *Westmoreland*, lord. Admission dated 18th September 11 Jac. 1. of *Charles* and *Joseph Andrew*, to one quarter of arable land, one hog yard and barn, the moiety of one close, one dole, and the third part of *Eight Road*, in *King's Delfe*, three lots and half in *South Meadow*, the third part of two holts in *South Meadow*, the third part of two holts in *Bell Hive*.

Twenty-third. Dowager lady *Westmoreland*, lady. Admission dated 27th September 12 Car. 1. of *Robert* and *Charles Elmer*, to one messuage, and one eight rood in *King's Delfe*.

Rates and assessments.

Twenty-fourth. The churchwarden's assessment of *Farcet* for the year 1681, whereby it appears, that *New Meadow*, *South Meadow*, *Milby*, the tithe of *King's Delfe*, and *Milby*, the *Eight Roads*, the lord *Berkley's* or *Adventurer's Lands*, and *Beale's Cotes*, were then rated to *Farcet*.

Twenty-

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Twenty-five. Land-tax duplicate for *Farcet*, for the year 1692, 11 *Wil. & Mary*, wherein *William Brownlow* esq. is rated to *Farcet* for his tithes of the *King's Lands*, *King's Delfe*, *Milby*, and the late inclosed fen.

Twenty-six, seven, and eight. The like for the years 1728, 1729, and 1730, wherein the vicar is rated for the tithes of the field and composition money, and for *Conquest Lands*, *King's Land*, and the great fen, small tithes, and glebe land.

Twenty-nine. The like for 1739, wherein the tithes of *King's Delfe*, &c. are expressed.

Thirty-one, two. The like for 1749, 1750, 1753, wherein *Beale's Cote* is rated by name.

Thirty-three, four, five. Land tax duplicates for *Stanground*, for the years 1692 and 1730, wherein part of the fen appears to be rated.

Parole Evidence.

The respondent lastly proved, by the testimony of living witnesses, the boundaries of *Farcet Fen* as herein-before described, and that *King's Delfe*, *Conquest Lands*, *Milby*, *New Meadow*, *Beale's Cote*, and the *Pingles*, lay within, and were considered as parcel of it.

That *Farcet* had separate parish and civil officers, viz. churchwardens, overseers, constable, and surveyor of the highways; that it maintains its own poor, and is separately rated to the land-tax.

Thirdly, That the inhabitants of *Conquest Land* serve all parochial and civil offices for *Farcet*, and not for *Stanground*.

Fourthly, That *Conquest Land*, *King's Delfe*, *Milby*, *New Meadow*, *Beale's Cote*, and the *Pingles*, and the fishery in *Whittlesea Meer*, are rated to *Farcet*.

Fifthly, That the drove-ways throughout the fen are under the care of the *Farcet* surveyor, and are repaired by the inhabitants of *Farcet* only, and that the inhabitants of ancient messuages in *Farcet* enjoy the exclusive privilege of keeping their hogs in the drove-ways.

Sixthly, That *Oakey Dyke*, the north-east boundary, (upon which *King's Delfe* adjoins), so far as it divides *Farcet's King's Delfe* from *Whittlesea King's Delfe*, is scoured as follows, viz. about half way by the owners in *Whittlesea*, and the remainder by the owners of ancient messuages, which formerly had rights of common in the open farm, and that no part of the dyke is scoured by the owners of *King's Delfe*, which lies next it.

State

State of the evidence produced by the appellant on the trial.

The defence set up at the trial by the appellant, exclusive of the objections taken to the legal validity of the grants, and to the evidence produced by the respondent, was, that the question in issue had been already repeatedly tried, and conclusively determined against the vicar, who ought not therefore to be permitted to revive claims against the tenor of their decisions; and he produced in evidence,

The record of a judgement in the court of Common Pleas, as of *Hilary* term 21 & 22 *Car.* 2. in an action brought by *Charles* earl of *Westmoreland*, as impropriate rector of *Stanground*, against *John Mawley*, for fifteen pounds, for treble value of the tithes of grain, oats, and malsyn, of twenty-seven acres of land in his occupation; which lands in the declaration are described to be situated within the parish of *Stanground*, and the boundaries, limits, and tithable places thereof; the verdict was found for eight pounds two shillings for the plaintiff, and for the residue of the fifteen pounds for the defendant.

The appellant's counsel alleged, that the lands, for the tithes whereof this action was brought, were parcel of the *Adventurer's Lands* (then called the *King's Lands*) and that the action was in fact defended by the vicar; but nothing appearing upon the record to warrant that assertion, he attempted to prove it in the following manner:

On *December 2* 1684 *Montague Cholmley* esq. and *William Brownlow* esq. an infant, the then impropriator of the said rectory, (by the said *Montague Cholmley* as his next friend and guardian) exhibited their bill in Chancery against the master, fellows, and scholars of *Emanuel College*, and *Dr. James Wolfenden*, then vicar of *Stanground*, charging the defendants with intent to stretch the grants of *sir Walter Mildmay* beyond their true intent, and with setting up a claim to tithes arising from sundry of the excepted lands, and the tithes of corn in certain lands situated in *Stanground* and out of the hamlet of *Farcet*; that the boundaries and identity of the demesne and excepted lands would be lost, unless the plaintiffs were permitted to record and perpetuate their evidence thereof; and that the defendants threatened to commence actions at law against the plaintiff's tenants for the recovery of tithes never before claimed by, or known to be due to, the vicar; and therefore praying, that the defendants might answer the bill, and that the plaintiff's proof of the matters aforesaid might be taken and perpetuated.

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To this bill the defendants appeared, whereupon the plaintiffs immediately obtained an order and a commission to examine their ancient witnesses *de bene esse*, which was executed *ex parte* (the defendant not joining therein), and the depositions of a great number of witnesses were taken; but before it was returned, and before any answers were put in to the bill, Dr. *Wolfenden* died, and the college having shortly afterwards presented *John Ratcliffe* to the said vicarage on November 4 1685, the said plaintiffs filed a bill of revivor and supplement against him, stating the former proceedings, and praying that the plaintiffs might have the benefit of the testimony of such of the witnesses, examined in the lifetime of Dr. *Wolfenden*, as should not live to be again examined in ordinary course, and that the defendants might discover the particulars of the tithes they claimed.

The defendant *Ratcliffe* afterwards put in his answer, stating the grants and his claims under them, and that he hoped to prove that divers large fenny or marth grounds lay within the hamlet of *Fartul*; and admitting that he brought several actions in the name of the master, fellows, and scholars of *Emanuel College*, against *William Bellamy*, *Edward Dawkins*, *John Mason*, and *John Broskes*, which he conceived justly to belong to him.

The plaintiffs never examined their witnesses in chief, or proceeded further in the cause, although both Mr. *Brownlow* and the vicars lived many years afterwards.

The appellant produced and relied on the depositions thus taken, as evidence for him on the present trial; and in order to prove that the record of the judgement above-mentioned respected the tithes of parcel of the *King's* or *Adventurer's Lands*, he read from the depositions the following passages, viz. the depositions of *Robert Coveney*, to the eleventh interrogatory, folio 34. who says, "That about fourteen years before the time of his examination, to the best of his remembrance, there was a trial at common law between *Charles* earl of *Westmoreland* plaintiff, and one *Morley* and others, tenants to the *King's Lands*, defendants; at which trial the earl obtained a verdict for the tithes of the said lands, the deponent being present thereat, and that the earl was, at the time of the trial, lord and owner of the manor of *Stamground*; and says, he has heard and believes, that there was a private composition made between the late lord *Berkley* (or his agents) then lessee of the said lands, and *William Forbes*, then vicar of *Stamground* aforesaid, concerning the payment of these tithes."

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Deposition of *William Bellamy* to the same interrogatories, folio 159. says, "He remembers an action at law brought by the earl of *Westmoreland*, against one *John Morley*, and *Edward Dawkins*, for their non-payment of all their tithes growing and renewing upon parcels of the lands called *King's Lands*, to which they were then tenants; and that the same was tried at *Huntingdon* assizes, when a verdict was had against *Morley* and *Dawkins*, for the earl; and that one Mr. *Maurice Cole*, on the behalf of those defendants (then agent to the said lord *Berkley*), paid the treble damages given by the said verdict to the use of the earl; which action was tried, to the best of the witness's remembrance, about seven years since."

The appellant next produced the record of an issue, as of *Hilary* term 34 & 35 *Car. 2.* in an action in the court of Common Pleas brought by the master, fellows, and scholars of *Emanuel College* against *Edward Bellamy*, for thirty-six pounds, the treble value of the tithes of corn, oats, and hay, of twenty-six acres of land, and thirty acres of pasture, in the vill of *Farcet*, in his own occupation, the declaration stating the plaintiff to be impropriator of the tithes of grain and hay arising out of the said lands.

The roll contained no entry of any judgement; but the appellant's counsel alleged, that the plaintiffs were nonsuited; and, as evidence of a judgement of nonsuit, produced the copy of an entry of the name of the cause in the prothonotary's book, intitled, *specialia judicis*; but the entry does not express what the judgement was, nor whether for the plaintiffs or defendant, or indeed whether there was any judgement at all.

In further proof of the nonsuit, he read, from the depositions before-mentioned, the evidence of *William Bellamy* to the twelfth interrogatory, folio 165. who says, "That about two or three years past, there was an action at common law commenced by the vicar of *Stanground*, in the names of the master, fellows, and scholars of *Emanuel College*, against *Edward Bellamy* gentleman, for his non-payment of his tithes of *New Meadow*, and the tithes-oats of *King's Delf*;" which action being tried at *Huntingdon*, the said plaintiffs were nonsuited upon good evidence.

The next evidence produced by the appellant, was the record of a judgement of nonsuit in the court of Common Pleas in *Hilary* term 1 & 2 *Jac. 2.* in an action brought by the said master, fellows, and scholars of *Emanuel College*, against *William Bellamy* of *Farcet*, for eighteen pounds, the treble value of the tithes of

1778. oats of twenty acres of land in the vill of *Farcet*, in the defendant's occupation.

The remainder of the evidence produced by the appellant, consisted of the depositions of the other witnesses taken under the said commission, which went to the several points following:

First, To prove that the tithes of grain and hay in the meadows of *King's Delfe* and *Milby*, for many years past, and the tithe of corn of the *Adventurer's Lands*, since the drainage had been usually paid to the impropiator; and that the tithe of cole-see, hemp and flax, and all other small tithes, had been paid to the vicar, and that *New Meadow* paid no tithe; but that an acre thereof had been many years set out to the impropiator in lieu of tithe.

Secondly, To prove sundry perambulations of the parish of *Stanground*, in which it appeared, that when the inhabitants of *Stanground* arrived at *Farcet Fen*, the inhabitants of *Farcet* joined them, and they proceeded together round the whole of the boundary of the fen, described in the map annexed, and that disputes happened when the *Farcet* people attempted to perambulate the same alone.

Thirdly, That the courts-leet of *Stanground* had occasionally taken cognizance of the offence committed by commoners in *Farcet Fen* before the inclosure thereof.

Fourthly, That before the drainage of the said fens, several drifts of the cattle of the commoners therein had been made by the assistance of the inhabitants of *Stanground* and *Farcet*, to the burystad-yard of *Stanground*, where they were detained till the owners paid their acknowledged pence to the lord; and from this circumstance the witnesses say, they believe the soil of the fen belonged to the lord of the manor of *Stanground* as parcel of that manor.

Evidence produced by the Respondent in reply.

The judge having over-ruled the objection taken by the respondent's counsel to the admissibility of the above depositions as evidence, and having permitted the appellant to read them, the respondent read out of them such passages as tended to corroborate his own title, by proving the payment of tithes to the vicar.

Objections urged by Appellant, in support of his motion for a new trial.

To the verdict found upon the several issues in favour of the respondent it was objected generally,

First,

First, That the evidence offered on the part of the respondent, and admitted by the judge upon the trial, was, in many respects, inadmissible in law, and ought not to have been received.

Secondly, That the conclusion drawn by the jury is not warranted by the evidence.

To the evidence produced in support of the vicar's claim to the several species of tithes under the first issue, it was objected, that the original endowment itself ought to have been produced, and that the copy of it alone was not sufficient, and ought not to have been received.

Answer.—It is not very easy to understand what is meant by this objection, but it is supposed to be this, that the instrument of endowment under the seal of the abbot and convent ought to have been produced; if this be the meaning, the answer is,

That such instruments of endowment are at this time very rarely to be found; that for the sake of preserving such endowments, it has always been usual to enter them in the registry of the bishop of the diocese, and that such entries in the bishop's registers have always been considered as originals, and received as such in evidence, without objection, in all courts of justice. If the two entries produced in the present case from the two registers of the bishop of the diocese were neither of them to be considered as originals, yet, as not any original is known to exist, they ought to be received as copies, deriving their authenticity from the places in which they are found.

Objection.—It is further objected, that the exceptions of the several species of tithes in the first issues ought to have been extended to the tithe of wool, as included under the word *garba*, and to the tithe of agistment, as included under the word *bladum*, and that in that respect the finding is wrong.

But the respondent humbly insists, that the sense in which the jury have understood those words is the usual and common import of them: that *garba* properly means a sheaf or bundle of corn, and is applicable to corn only; *bladum* all kind of grain in the blade, and that such is the sense in which they have been taken by old writers upon these subjects. And it is observable, that in the indorsement upon the copy of the endowment found in the registry at *Bugden* (by which the vicar is further endowed with the third of the tithe-corn in *Farset*) the word *garba* is used, which can only be applicable to sheaves of corn. In confirmation of these endowments, and of this plain sense and import of the words, evidence

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was given of the vicar's having always received the small tithes in general throughout the parish, without any exception of wool or agistment.

To the finding upon the second issue it is objected,

First, That the grants of sir *Walter Mildmay* are void in law, as being within the statutes of mortmain.

Secondly, That the finding of the jury is not warranted by the words and meaning of the grants.

Thirdly, That there ought to have been an exception for such part of *Stanground* as lies in the county of *Cambridge*, the grant mentioning the county of *Huntingdon* only.

Fourthly, That it does not appear from the evidence, what the *Berystead* farm is.

Answers.—The respondent submits that he might safely rely upon the evidence of the receipt of all small tithes throughout the parish by former vicars; his predecessors, in answer to these objections; from which it appears, that the immemorial usage in the parish has been so:

First, The objection that sir *Walter Mildmay's* grants are void in law seems to come with very little propriety from the present appellant with a view to defeat the act of his predecessor, under which all subsequent impropiators for a space of now near two hundred years have uniformly acquiesced. But it is insisted, that these grants are not within the statutes of mortmain, nor is the subject of these grants, viz. tithes, one of the objects of those acts, as will appear from the words of those acts, in which lands, and lands only, are particularly mentioned:

Tithes, in their original institution, were designed for the support of the officiating clergy, in their respective parishes; and although they were frequently annexed to religious houses, yet some provision was always made for the person who actually performed the duty. It was incumbent upon the religious house to make a reasonable provision for the vicar. That duty devolved in the present instance upon sir *Walter Mildmay* after the abbey was dissolved; and it seems very hard to contend, that because sir *Walter* has given back a part of that, the whole of which was once designed for the officiating parson, that gift shall be void. But the respondent submits, that if it be held that in such an instance as the present, a licence to alienate in mortmain be necessary, it is not incumbent upon him to produce such a licence; but that after the length of time which

which has elapsed since the date of the grant (1588) it will be presumed, that there was a licence then, and that it is now lost.

Secondly, The respondent submits, that his right to the tithe of wool, lamb, and calf, is clearly established by the first grant of sir *Walter Mildmay*, by which those tithes are absolutely given to the vicar and his successors, and that the verdict of the jury is warranted by that evidence alone, without having recourse to the second grant.

Thirdly, The words "in the county of *Huntingdon*" are only descriptive of the general local situation of the parish of *Stanground* with *Farcet*, by much the greater part of which lies in that county, and a very small part of it in *Cambridgeshire*, and it is submitted, from the recital of the grant and the wording of it, that it never could be the meaning of sir *Walter Mildmay* to give less than all the tithe of wool, lamb and calf (with the exception of the demesnes) throughout the parish; to which may be added, that in the grants to sir *Walter Mildmay* of the manor and rectory the county of *Huntingdon* alone is mentioned.

Fourthly, The exception of the *Berrystead* farm is a well-known description of the manor farm, undoubtedly containing what was originally called the demesne of *Stanground*, and the old witnesses speak of it by the name of the *Berrystead* farm, as being so called in the last century.

To the fourth, fifth, and sixth issues it is objected, that the evidence does not warrant the conclusion of the jury; but that as to so much of the tithe of corn and grain as depends upon the second grant of sir *Walter Mildmay*, by which one half of the tithe-corn in *Farcet* is given, it ought to have been found with an exception of the demesnes and other lands, and also, that the vicar's right does not extend over any lands, but such as produced corn at the time of the grant, and were then called the fields of *Farcet*.

The fifth and sixth issues being subdivisions of the fourth, the respondent humbly insists, that if the evidence be found to be sufficient to support those issues, it will follow of course that the finding of the fourth in his favour is right.

The indorsement upon the old endowment found in the registry of *Bugden* (by which it appears that 22 H. 6. 1444 the then abbot of *Thorney* increased the vicar's portion by adding to it one third of the tithe-corn in *Farcet*) would, it is submitted, be alone sufficient evidence to warrant the verdict of the jury upon the fifth issue. But this is corroborated and solemnly acknowledged at the

distance

1778. distance of near one hundred and fifty years by the then impropriator sir *Walter Mildmay*, who in his deed of 24th October 1587 recites it as a known fact, "that the vicar and his predecessors had but only one-third part of the tithe-corn of *Farcet*," without excepting any part of that hamlet.

By the grant from the abbey of *Thorney*, which gives "*tertiam partem decimis granorum in campis de Farshed*," it is submitted, that not only the tithe of such land as at that time produced corn is granted, but all corn-tithe whatever, which at any future time should arise from any newly cultivated land within the hamlet, and that such is the obvious sense of the words of the endowment, and the legal inference from them. This too plainly appears to have been the opinion of sir *Walter Mildmay*, who in the addition which he makes to the vicar's tithe-corn expressly mentions "that he would then have a full moiety of all the tithe-corn renewing in the town, fields, and hamlet of *Farcet*." A description as general of the whole extent of *Farcet*, as words can convey, and that too without any exception of any lands whatever; for the exception of the demesnes of *Stanground* in that grant relates to the tithes of wool, lamb, and calf only.

Upon the sixth issue, by which the vicar claims two thirds of the tithe-corn in *Farcet*, it is submitted that the evidence supports the verdict: one sixth part is given by the first grant in general terms "throughout the town, fields, or hamlet of *Farcet*:" to this grant there is not any exception; but in the second grant there is an exception, to which the jury ought, as the appellant contends, to have paid some regard; and not having done so, the verdict is, in that respect, against evidence.

Upon a careful and attentive perusal of the two grants, with the deed poll of 9th April 1588, it will appear, that the deed poll is very incorrectly worded, and has certainly given rise to the errors which are manifest in the second grant.

By the first grant sir *Walter Mildmay* had disposed of all his tithes of wool, lamb, and calf, throughout the parish, except only the demesnes of *Stanground*. The object of the deed poll is to resume to himself certain tithes which he had by a prior deed, bearing date only two days after the first grant, settled to certain uses, with a power of revocation. By that deed poll he resumes all the tithes of wool, lamb, calf, corn, and grain, which at any time thereafter should be coming, arising, &c. within the town or hamlet of *Farcet*; but sir *Walter* had no tithes of wool, lamb, and calf, in

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Farcet at that time; in this, therefore, the deed poll is incorrect. The second grant is copied from the deed poll, and professes to convey more than sir *Walter* had to grant, viz. the tithes of wool, lamb, and calf; but it can hardly be contended, that because it describes more than sir *Walter* had, it shall not even pass that, which it is obvious he meant, and was about to convey, namely "all those his tithes of corn and grain, within the parish, town, or hamlet of *Farcet*;" and as sir *Walter* knew, that the vicar had at that time one clear moiety of the tithe-corn there, without any exception, and had himself contributed a part of but six months before, it is impossible to conceive, that he could design to add the other moiety to it, subject to any exception whatever. In fact, the exception can only apply to the tithes of wool, lamb, and calf, by relation to the first grant, in which that exception is found, and from which it has inadvertently been copied into the deed poll, and the second grant.

Upon the third issue, by which the several parcels of land mentioned in it are found by the jury to lie within the vill, town, or hamlet of *Farcet*, it is submitted, that there is evidence to prove, that all those parcels are included within the known boundary of the large tract of marsh ground commonly called *Farcet Fen*.

The manors of *Stanground* and *Farcet* were distinct from each other, and appear to have been so by the separate accounts which were kept of each. The rights exercised by the lord of the manor of *Farcet* over the marsh called, *Farcet Fen*, clearly prove, that in old time it was considered by all persons concerned, as lying within the limits of that manor.

Smith accounts for the agistment of the fen *Mich.* 31 to 32 *H.* 8. as parcel of the manor of *Farcet*.

Sir *Walter Mildmay* 25th August 1591 obtains a lease of the manor and rectory of *Stanground* from queen *Elizabeth* for sixty years.

The manor of *Farcet* 7 *Edw.* 6. A. D. 1553 is granted to sir *Walter Mildmay* in fee.

By the decree of the duchy of *Lancaster* 7 *Eliz.* A. D. 1564 the fen is said to be the very right and inheritance of sir *Walter*.

By agreement 10 *Eliz.* A. D. 1567 between sir *Walter* and the commoners, 400 acres of *Farcet Fen* adjacent to his close, called *Conquest Close*, were allotted to him, "which should be held by him, and his heirs, in fealty for ever." From which two instruments it appears, that the decree and agreement related to the manor

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manor of *Farcet* alone, of which sir *Walter* was at that time seised in fee. He had at that time only a lease for years of the manor of *Stanground*, under which the fen could never, with legal propriety, be called the very right and inheritance of sir *Walter*; still less could he, as lessee for years, accept from the commoners the 400 acres adjoining to *Conquest Close*, to hold to him and his heirs in severalty for ever; or, in compensation thereof, have taken upon him to execute to them a release of the right of himself and his heirs to the herbage of the residue of the fen.

It is manifest therefore, that he was considered as the lord of *Farcet* manor only; and, in fact, those 400 acres have been enjoyed by the lords of *Farcet* manor in severalty for ever since, and are actually now in the hands of lord *Brownlow*, the present appellant.

From this evidence which applies thus pointedly to the whole of *Farcet Fen*, the conclusion seems obviously to follow, that no part of the fen can be, or ever was considered as parcel of the demesne of the manor of *Stanground*; and although it is not contended on the part of the respondent, that in all cases the boundaries of a vill, town, or hamlet, are co-extensive with the boundaries of a manor of the same name, yet it is insisted that such evidence was proper to be laid before a jury, and carries with it a degree of probability, at least, where positive evidence of the actual boundary of the hamlet in question cannot, at the distance of 200 years, be procured; especially when the fen has, though equally near to the hamlet of *Stanground*, been ever distinguished by the name of *Farcet Fen*, and the river which lies between *Packet's Holme* and *Horsely Bridge*, and which divides *Farcet Field* and *Stanground Field* from the fen, is likewise known by the name of *Farcet Water*.

From the usage of later times it appears, that the land-tax assessments have rated the fen as lying within *Farcet*; that *Farcet* has its constable, surveyor of highways, overseers of the poor, and church or chapelwardens.

That the occupiers of *Conquest Lands* serve parochial and civil offices for *Farcet* only.

That *King's Delfe*, *Milby*, *New Meadow*, the *Pingles*, the fishery of part of *Whittlesea Meer*, are rated to the poor's rate in *Farcet*, except a few doles in *King's Delfe* to *Stanground*, which was the ground of the exception which the jury have made as to the local situation of part of *King's Delfe*.

The local situation of the several pieces of ground mentioned in the third issue, being by the verdict of the jury ascertained to be within the hamlet of *Farcet*, the vicar's right to tithe, in pursuance
of

of his endowments, necessarily attaches upon them; a right which, when the land was drained in the last century, was claimed by the then vicar against the impropriator, and which, though disputed as to its extent, was never absolutely denied, till the present appellant was advised to dispute, and actually does dispute, any right which the vicar may have to any tithe at all; and this against the evidence of the grants of his predecessor sir *Walter Mildmay*, from whom his impropriation is derived; against the uninterrupted enjoyment of tithes of some kind throughout the parish; against the composition of twenty-five pounds a year, constantly paid from the year 1640 to the year 1773; and lastly, against the leases of 1691 and 1751 from the then vicar to the then impropriator of all his tithes of what nature or kind soever in *Farcet Fen*, at the yearly rent of fifty pounds.

On the part of the appellant were produced,

First, Old records.

Secondly, Depositions in a cause 1684.

The first record merely shews, that the earl of *Westmoreland*, as impropriator of the rectory of *Stanground*, obtained judgement in an action for tithes of grain and oats for lands within the parish of *Stanground*. This certainly proves nothing against the vicar, for it never was denied, but that the impropriator had a right to the tithe of grain in all parts of the parish, not in the hamlet of *Farcet*.

The second record contains a declaration and plea merely, and nothing else.

The third is a judgement of nonsuit, in a cause of *Emanuel College* against *William Bellamy*, but upon what ground the nonsuit was obtained, does not appear.

If such evidence as this deserved an answer, the subsequent leases accepted by the impropriator from the vicar, which are stated to have been granted in consequence of a compromise, would be decisive proof, that there had been no decision in those actions against the right of the vicar. But as in one record the proceedings went no farther than the plea, and it is well known that a nonsuit by no means precludes a party from prosecuting a further claim, these records seem to have no force at all.

The depositions in the old cause appear to have been *ex parte* examinations merely; the witnesses never were examined in chief, nor was there any cross examination on the part of the vicar; the depositions were never published; such evidence, if admissible, is certainly, on the impropriator's part, entitled to very little credit,
and

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and can never be supposed to weigh, in the opinion of a jury, against old records, long usage, and the variety of circumstantial evidence produced on the respondent's part.

What relates to the supposed jurisdiction of *Stanground* manor over *Farcel Fen* is certainly entitled to no credit at all; the appellant is lord of the manor of *Stanground*; the rolls and proceedings of the courts of that manor are in his hands, and are the only proper evidence of the rights which have been exercised by the lord at different times; no such evidence was produced at the trial, or offered; but, as it is obvious, that such evidence must have been material had any such existed, the respondent submits, that he has a right to conclude, either that no such jurisdiction of the manor of *Stanground* can be proved to exist, or that, if the rolls had been produced, they would have proved the direct contrary.

From the accounts given of the perambulations, nothing certain can be concluded, but that the inhabitants of such township were jealous of the encroachments of the other, and kept a watchful eye over every attempt that might be made by the one to abridge the rights of the other.

The vicar's right to tithes in the fen is certainly not abridged or affected by any evidence tending to shew that the impropriator has occasionally received tithes there, because it was a matter of perpetual controversy between the impropriators and the vicars during many years; compositions of twenty-five and thirty-two pounds existed during the time; which compositions particularly related to *King's Lands* in the fen; so that any receipt of tithes from off those lands by the impropriator, as long as that composition existed, was in fact the receipt of the vicar by the hands of another.

Upon the whole, it is submitted on the part of the respondent, that the order which has been made by the Lord Chancellor for refusing a new trial, ought to be affirmed for the following (amongst other) reasons:

First, That there is not the least ground to impute to the learned judge, who tried the cause, any misdirection to the jury, nor the admission of any improper evidence in favour of the respondent, nor the rejection of any legal evidence on the part of the appellant.

Secondly, That the far greater and more material part of the evidence is in writing; of the import and effect of which, the Lord Chancellor was, and their Lordships are competent judges; and
upon

upon which there is no reason to suppose, that any further light could be thrown by another reference to a jury.

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Thirdly, That the parole testimony given was almost wholly in favour of the respondent, and the cause was tried with every possible advantage to the parties and to justice, a full special jury of gentlemen having attended the trial, (which employed two whole days) many of whom had taken a view of the lands out of which the tithes in question arise.

July 2 A. D. 1782. Ordered and adjudged, that the appeal be dismissed, and the order complained of affirmed.

H. 19 Geo. III. A. D. 1779. Scac.

Williams v. Williams, & c contra. [MS.]

LORD C. B.—This is a bill by the vicar of *St. Kevern* in *Cornwall* for almost all small tithes. The defence admits an endowment of all the tithes in question, but insists upon customary payments for all the ancient farms, and also for certain dues and offerings. The parishioners have filed a cross bill to establish these customary payments. On the part of the defendant, the proof arises from two written instruments; one, an ancient parish-book kept in the parish-church among the parish papers, entitled "*St. Kevern* parish 1683. An account of the tithes then due, &c. according to the ancient custom of the parish;" and concluding "we the minister and twelve of the parish do find the custom above, &c. to be the ancient custom, &c." signed by them all. The next, a terrier dated 1727 brought from the Bishop's Registry, in which are words to this effect, "said to be a pretended custom as follows;" then it transcribes the former. None of these tithes, as far as appears, have ever been paid in kind. But the payments for marriages, &c. have been various and frequently different from those stated in the two instruments. In 1683 therefore there appears a formal acknowledgement of the vicar of the existence of certain customs. Whether the tithes in kind were paid before or after the terrier does not appear; but probably not, because of the phrase "pretended," whence it seems at that time to be asserted on one side, but not admitted on the other. However, it does not appear that the vicar ever took tithes in kind. The compositions themselves afford no certain evidence whether paid for the tithes in kind, or for the customary payments. There is therefore such a ground as deserves further inquiry. The terrier is said to be imperfect,

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perfect, because all tithes are not included in it: but it does not appear, that the parish has yielded those species which are omitted. And it is observable, that there is no proof of tithe in kind having been paid for any other species than those mentioned in the papers. As to the dues, it has been insisted, that there is a difference; yet if those payments appear to be part so, part not, they may be separated by a jury.

The mode of inquiry is next to be considered: for it is said truly, that the exemptions alleged are of particular farms, those proved are general. There being no prayer suited to the proof in the cross bill, that must be dismissed; for the court cannot decree what is not prayed. As to the vicar's bill; there, an indorsement being made will enable the court to decree for him only so far as he appears entitled: if no moduses are found, to decree him tithes in kind: if any, then such modus arrears.

Eyre B.—Is the defence sufficient to prevent the court from decreeing tithes in kind? Now, by the paper of 1683, if the usage had been conformable to it, the vicar could not have claimed tithes in kind for the customary payments there. Yet besides the usage, some things on the face of the paper go to shake its authority. We cannot therefore make a decree upon the foundation of it. The compositions proved are consistent with both cases. The issues therefore to be tried must be as directed by the Lord Chief Baron. As to the cross bill, the plaintiffs have mistaken their right; and as that which they pray cannot be decreed, it must be dismissed, and with costs, as the defendants are all brought here unnecessarily.

Hotham and Perryn B. concurred, and that the cross bill be dismissed with costs.

H. 19 Geo. III. A. D. 1779. C. P.

Pyke v. Dowling. [2 Bl. Rep. 1257.]

Rankness of a modus is not a question of law, but of fact to impeach its immemoriality.

THIS was a case from the court of Chancery.

The plaintiff *Robert Isaac Pyke*, as vicar of *Chew Magna* in the county of *Somerset*, is entitled to all the tithes of the parish of *Chew Magna* and the hamlet and chapelry of *Dundry* (except the tithe of some ancient demesne lands called *Overlands*), or to certain moduses for the same, and in lieu thereof.

The defendant *Dowling* is the owner and occupier of a certain farm and lands within the said vicarage and chapelry, or the tithable places thereof, and hath raised and kept many lambs upon his said farm,

farm, "and sets up a modus of 2 s. 6 d. to be paid to the vicar of the vicarage aforesaid, on 5 April in each year, being *Lady-day*, old stile, in lieu of every tenth lamb in kind."

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The question for the opinion of the court is, whether such modus of 2 s. 6 d. for every tenth lamb, to be paid on 5 April in each year, is a good modus, or not.

Heath for the plaintiff, argued that it was bad, as being too rank, and out of all proportion to the price of lambs in the time of *Richard the First*, according to the calculations of bishop *Fleetwood* in his *Chronicon pretiosum*, and cited *Grascomb* and *Jefferies*, A.D. 1687, and *Layfield* and *Delap*, both mentioned in *Chapman* and *Smith*, 2 *Vez.* 506. to shew the antiquity of this objection. So, in *Lord Raym.* 1163. *Powys* justice said, that such modulus were always over-ruled, when he sat in the Exchequer. Accordingly in *Benson* and *Watkins*, *Bunb.* 10. a very rank modus was over-ruled.

Grose for the defendant insisted, that though a court of Equity might determine as they pleased, yet when they sent a question to be decided by the courts of law, it must be taken up upon legal grounds. Rankness, as it is called, is only evidence against the antiquity of a modus, but the question, whether the modus is good, must mean whether it is unreasonable or unjust, and that presupposes the modus to have existed, in point of fact, from the time of legal memory; and if so, what objection can be raised to this modus in point of law?

And by the Court (in the absence of *Gould* justice).—Courts of Equity, which are judges of both the fact and the justice of the case, may certainly over-rule a modus, where they see that the internal evidence against the possibility of its immemorial existence is so strong, that it would be nugatory or oppressive to send it to be tried by a jury. And by *Blackstone* J.) so it was done by lord *Hardwicke* in *Moore* and *Beckford*, *H.* 1750, 24 *Geo.* 2. who said he should be ashamed to send a modus of 30 l. *per annum* to be tried by a jury, where the real value of the tithes was not above 60 l. and decreed for the plaintiff, the parson, with costs. So in *Torriano* and *Legge* six different modulus were over-ruled for being too rank, without directing an issue to try any of them. But when its goodness is referred to a court of law, we must take it for granted, that the fact of its having immemorially existed is admitted, and only consider what objections may be made to it in point of law, as for uncertainty, inequality, &c. We shall certify our opinion to the Chancery.

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The certificate was as follows :

" We have heard counsel on both sides, and have considered this case; and as the case supposes the existence of the modus in question from time immemorial, which we conceive to be a question of fact, we are of opinion, that there does not appear any reason why this should be considered as a void modus in point of law."

9th February 1779.

W. De Grey.
W. Blackstone.
G. Nares.

H. 19 Geo. III. A. D. 1779. Scac.

Fynes v. Ordoyno. [MS.]

LORD C. B.—This is a bill by the vicar of *Newark* for certain species of small tithes which he claims by endowment. The defendants, who are the occupiers, and impropriator, insist that the vicar is not entitled, because a pension of 10 l. is paid by the impropriator to the vicar in lieu of all tithes, and he, the impropriator, is entitled to the tithes.

The vicar founds his title upon an endowment in 1428, giving all tithes and all profits of the church except the lands belonging to the church and the tithes thereof, and except the tithe of corn, hay, wool, and lamb, which are decreed to belong to the prior and convent of *St. Catherine* at *Lincoln* and the order of *St. Gilbert*, and subjecting the vicar to the payment of twenty marks yearly to the prior and convent. This endowment is a title, unless it has been since legally varied. The defendants insist that it has, and that 10 l. pension has been given in lieu of the tithes. If it stands without evidence one way or the other, though the vicar has not received the tithes, the endowment is still to prevail.

The defendants have given parole and written evidence to prove a time when the vicar was not entitled to the tithes. The parole respects agistment-tithe, but no particular instances are specified except for a short time, and afterwards refused. Tithe of onions has been shewn to be paid to the impropriator in kind. Besides this, there has been much written evidence. 1. The *Liber Regis* in 26 H. 8. where it appears that the vicar is entitled to several species of small tithes, value 40 s. &c. and liable to the payment of 10 l. to one of the parish priests. Therefore all was not taken from him at that time.

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2. The minister's accounts in 30 *H.* 8. The bailiff then accounted for 14 l. 8 s. for the farm of the rectory and tithe of grain, hay, wool, and lamb, and for some particular small tithes, at 8 s. and of small tithes in general of two persons, at 40 s. A pension at this time was payable by the vicar. Here appear then to be other tithes besides corn, wool, and lamb belonging to the rector. But it is observable, that the small tithes over all the glebe were likewise reserved to the monastery. It is observable, too, that the pension to the rector was at that time payable.

3. Minister's accounts of 37 *H.* 8. Of the same amount ; stating likewise the pension.

4. Minister's accounts of 1 *E.* 6. This states the pension of 13 l. 6 s. 8 d. not answered for 20 years last past, because the profits of the vicarage were so inconsiderable as not to be equal to the discharge of it. From this time therefore there is no evidence respecting the pension.

5. 2 *E.* 6. a return of commissioners under 1 *E.* 6. for suppressing chantries, that an assistant was necessary to serve the cure in *Newark*.

6. In the Receiver General's account 3 *E.* 6. an article of 10 l. payable to an assistant in the cure of *Newark* out of the chantry lands, during pleasure of the court of augmentations.

7. Particulars of a lease, shewing that the rectory had been demised for 7 l. rent, and 10 l. to the vicar.

8. Demise by the crown to the countess of *Rutland* of the rectory, with a covenant to indemnify the crown from payment of the 10 l. Now it appears that the 10 l. had been appointed during pleasure out of the chantry lands. After that time it had been charged on the rectory, which accounts for the covenant of indemnification. Hence it appears how the pension of 13 l. 6 s. 8 d. had been discharged, and how that of 10 l. became payable to the vicar. This is a very satisfactory account of the continuance of the vicar's right. He is therefore entitled to an account of the several tithable matters.

P. 19 Geo. III. A. D. 1779. Scac.

Broadley v. Brocklebank. [MS.]

Yorkshire, 7th May 1779.

THE plaintiff stated that he had, for 36 years past, been entitled to all the tithes of corn, grain, hay, and potatoes, in kind, arising in *Tranby, Anlaby, and Walsfretton*, in the parish of *Elveley* or

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Kirk Elly, in the county of *York*, and the tithable places thereof, formerly part of the possessions of the *Priory of Haltonprice*; that the defendants *Brocklebank* and *Bilton*, inhabitants and occupiers of several lands in *Tranby*, had, in 1776, planted large quantities of potatoes in the open fields, and dug them up and carried them away, without setting out the tithe thereof. He therefore prayed an account and payment of the same.

The defendant, the vicar, denied that the plaintiff was rightful impropiator or rector of the parish, or that he was entitled to the tithes demanded by the bill. He said, that he believed he had purchased some portion of the great tithes of the parish; but could not tell what right he had so purchased; that much the larger part belonged to the heiresses of *R. Ellerker* deceased; that the said co-heiresses were rectors and patrons of the vicarage; that the plaintiff was not entitled to the tithe of potatoes or any other small tithes arising in that parish; but that he, as vicar thereof, was entitled thereto; that he had been vicar of the parish 42 years, and was presented thereto by *E. Bradshaw* deceased; that he and his predecessors had always received the small tithes within the rectory, or a satisfaction for the same, and in particular the tithes of potatoes; but that he had never seen the original endowment of the vicarage, nor did he know where to find the same.

The defendants *Brocklebank* and *Bilton* also denied that the plaintiff was impropiator or rector of the parish, or that he was entitled to the tithes of potatoes; and said that they had heard that he had purchased some portion of tithes, but what portion they could not say; they admitted that they were occupiers of lands in *Tranby*; and that they had planted potatoes in the open fields, and had dug them up and carried them away, after setting out the tithes to the vicar.

On the hearing the plaintiff proved his title to all the right of the impropiator within the three hamlets, and in order to disprove the vicar's prescriptive right to small tithes, produced an endowment of the vicarage, which, as he said, proved that the vicarage had its creation within time of memory. This endowment was dated 1344, but reciting that the Archbishop (who makes it), had by a former instrument appropriated the rectory to the priory of *Haltonprice*, reserving to himself the ordination of a perpetual vicar, the court thought that this was not certain proof of the vicarage having had its first commencement at this time. Added to which, the remaining part of this endowment enumerated many, viz. ten species of small tithes, and one of great, for the support of the

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the vicar. Among these were *decimæ quadragesimales*, which might comprehend any species of tithes payable at *Lent*; and then followed a reservation to the monastery of the tithe of agistment of their own cattle, and of the tithe of their own garden, two species of tithe which were not enumerated by name, and which therefore need not to have been reserved, unless they would have passed to the vicar under the words *decimæ quadragesimales*. The parol evidence in the cause proved generally the enjoyment of all small tithes by the vicar, except in one instance, where the rector had about 30 years ago received the tithe of potatoes the first time of their cultivation in the parish. The court therefore clearly thought, that the endowment coupled with the usage proved the right to all small tithes to belong to the vicar; consequently, that the plaintiff's bill must be dismissed, because, though the court might have required more proof if the vicar had desired to have his right established, yet this was sufficient to prove that the plaintiff could not make out his right to that which he demanded. There was also given in evidence a *nova ordinatio*, as it was entitled, made about a century afterwards, whereby the then archbishop, upon a suggestion that the monastery was so far impoverished as to be unable to maintain its due hospitality, did, with the consent of the then vicar, ordain that the monastery should for the future pay to the vicar only 20 marks a-year in lieu of the portions of tithes which had been allotted to him. But there being no evidence whatever that this payment of 20 marks had ever been made, but, on the contrary, there being evidence that the small tithes had been enjoyed by the vicar as far back as the witnesses remembered, it was presumed by the court that this instrument had never been carried into execution. The bill therefore was ordered to be dismissed, but without costs.

Tr. 19 Geo. III. A. D. 1779. Scac.

Calmell v. Sherratt and others occupiers, and *Muchell* vicar. [MS.]

THIS was a bill to establish the plaintiff's right as lessee of the dean of *Litchfield* against the vicar, and for an account of all small tithes, and some others against the occupiers. The patron of the vicarage not being made a party, the plaintiff could not proceed upon the prayer to establish, he therefore (rather than let the cause stand over to amend) waved that part of his prayer. To prove his case he merely produced a lease of all tithes belonging to the

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rectory, excepting the vicarage and its tithes. The vicar gave in evidence an ancient copy of an endowment *in toto alteragio, agnis, et lanâ, et principali legato*, with marginal notes accounting for non-payment of lamb and wool, and the strongest proof both from the plaintiff's witnesses and his own, that he and his predecessors had received constantly money payments from the different inhabitants at *Easter* annually, under the name of *Easter dues*, different in quantity, *viz.* many of 1 s., 2 s. 6 s., 3 s. and some of 12 s. and 15 s. which from their magnitude could not be mere *Easter* offerings, and which were constantly in the parish understood and reputed to be a composition for all small tithes except wool and lamb, and except hemp and flax; that the vicar had received distinct payments for hemp and flax, usually at the rate of 4 s. and 5 s. an acre, and had likewise received from foreigners having land within the parish, sums under the name of *herbage money*. Some of the *Easter* dues were likewise paid for lands on which no horses had for some time existed. Besides this, he produced a survey out of the dean and chapter's registry, supposed to be the *parliamentary survey*, in which the small tithes, except lamb and wool, were said to belong to the vicar. Against this there was no evidence except one witness as to herbage of sheep, which proved no more than that the rector was entitled to tithe of wool. As to the occupiers, they proved payment to the plaintiff of all but small tithes, except in one instance of half a year's hay, which being doubtful, an account was directed as to that at the peril of the plaintiff. As to all the rest the bill was dismissed, and the only question was respecting the costs. The plaintiff urged his right at common law, and the usage to let him try it without costs. But the court thought this so very plain a case, all the evidence of endowment being within the plaintiff's own reach, as well as of usage and reputation (either endowment explained by usage, or usage alone being sufficient for the vicar), that there wanted *probabilis causa litigandi*; and as his demand was without a shadow of foundation, and that to his own knowledge, he ought to pay the costs, and so it was directed (*b*).

(*b*) In Mr. *Baron Fyfe's* notes of this case, it is stated that the bill was dismissed against the defendant *Sherratt*, because it turned out in evidence that the plaintiff had made a lease of his tithes in that district in which *Sherratt's* lands are stated in his answer to lie; which makes an equitable nonsuit; that it turned out too, that the tithes demanded as against *Loddle* had been paid. Vide 4 *Wood's Decr.* 94.

Tr. 19 Geo. III. A. D. 1779. Scac.

Robinson v. Barroby. [MS.]

THIS was a bill to establish customs of tithing. The defendants denied the customs, but acknowledged that they had tithable matters which were unpaid if due in kind. The counsel for the plaintiff stated, that the evidence was so strong as not to bear controversy. But the court said, that customs never were *established* without trial at law, where the defendant denied the custom, unless the defendant should waive an issue tendered. And this was admitted to be the practice on all hands.

Customs not established without a trial at law, unless the defendant waives an issue.

Tr. 19 Geo. III. A. D. 1779. Scac.

Jeremy v. Strangeways. [MS.]

THIS was a bill by the vicar of *Murlinch* in *Somersetshire* against the impropriator and occupiers for an account of tithe of seed-clover, and to establish his right. On evidence of a general immemorial receipt of all small tithes arising within the parish, except the tithe of clover-feed, which alone appeared to have been paid to the impropriator, the court decreed an account from the time of filing the bill, it not having been demanded before, and to establish the vicar's right. And as one of the witnesses stated that the payments of clover-feed tithe had been made to the impropriator under a mistaken notion (which long prevailed even in courts of law) that the seed followed the nature of the grass, and belonged as such to the impropriator, to whom the tithe of hay belonged; the court decreed it without granting an issue, though that was asked by the impropriator; but without costs (notwithstanding it was alleged that in all the former cases costs had been given), because the vicar appeared for so long a time, (seven or eight years after becoming so), to have acquiesced in the payments to the impropriator, and not to have claimed it but by his bill.

A vicar in the perception of all small tithes, except the tithe of clover-feed, which has been paid to the impropriator under a mistaken notion that the seed followed the nature of the grass, is entitled to that species of tithe.

Tr. 19 Geo. III. A. D. 1779. Scac.

Scott v. Airey and others. [Sir J. Mitford's MSS.]

Where a defendant claims a portion of tithes, and supports that claim by evidence of long possession, a court of equity will not interfere, but leave the plaintiff to his legal remedy.

THE bill was filed by Dr. *Scott*, as rector of *Simonburne* in *Northumberland*, for the tithes of corn and grain of a farm called *Eal's Farm*; for the tithes of corn from *Park End Farm*, *Linbush Farm*, *Lotterford Door Farm*, and *Hillhouse Farm*; for agistment-tithes of *Haughton Strother's Farm*, and *Knott's Farm*; and for the tithes of milk from *Lee Hall Farm*. Several of the defendants were occupiers of some of those farms; and the defendants, the *Aireys*, were owners of part of the lands, and claimed the tithes of *Eal's Farm*.

The principal question was, whether the plaintiff was entitled to the tithes of corn and hay of the lands of which the *Aireys* claimed those tithes?

In delivering the opinion of the court, the *Chief Baron*, after stating the case, observed, that the present case was not a demand of tithe for land which had hitherto paid no tithe, and that the defence was not a prescription in *non decimando*. In all such cases (he said) the rule has been, that a person setting up an exemption from the payment of tithe must shew the particular ground of exemption. If that is not shewn, the defence amounts to no more than a mere non-payment of tithe, which, however long, is no defence. But, in the present case, the plaintiff claims the tithe of land of which tithe has been constantly taken. For, although a part of the land has not actually paid tithe, it has been no otherwise exempt, than because the tenant of that part has been tenant of the tithe of all.

The tithes having been actually paid, the next question is, how they have been paid. They have been paid from particular lands in the nature of a portion of tithes. It appears that in 5 *Ja.* 1608, these tithes were in the possession of the *Ridleys*. A fine was then levied of them by *Ridley* and his wife. They were afterwards devised by his son in 1673. His grandson in 1674 devised them to trustees in trust to sell. They were actually sold to *Whitfield* in 1683. They were afterwards the subject of a family settlement on the marriage of a daughter of *Whitfield* in 1704. In 1708 they were conveyed in fee to *Green*. They were afterwards mortgaged, and different assignments were made of the mortgage. They were then

then again devised by the mortgagee, and the devisee purchased the equity of redemption, and devised to persons under whom the defendants, the *Aireys*, claim. For 170 years they have been the subject of sales, mortgages, and devises, as other property, and have been always considered in the same light as the other real property of the persons who from time to time have claimed them. They were capable of being enjoyed by the persons who have enjoyed them; and the question now is, whether a court of Equity ought to interfere to take the possession from persons who have been in possession for so many years with knowledge of the rector. It does not appear how the *Ridleys* became entitled; but it appears, that being in possession, they settled, mortgaged, and devised the tithes as their own absolute property. If notwithstanding this long possession, the plaintiff is legally entitled, he is not without remedy. But it is too much in a case of this kind for a court of Equity to interpose, and after so long a possession, to take the property from the possessors, and decree the rector entitled to it. The court has been pressed to direct an issue: but there seems no reason for the court to interpose thus far. Whether the court directs an issue, which adopts in some degree the plaintiff's demand, or leaves the plaintiff to pursue his legal remedy, he may make good his demand, if it is well founded. It is therefore not absolutely necessary for the court to interpose.

Eyre B.—The principal question in this case is the defence set up by the *Aireys* against the *prima facie* title of the rector, founded on a title set forth in their answer, and the indisputable fact of actual possession, occupation and pernancy of the tithes. The distinction between a prescription in *non decimando*, and a claim of a portion of tithes, is an essential distinction. A prescription in *non decimando* is simply unlawful. No such prescription can be maintained. If no tithes have been paid, a title founded upon mere non-payment is simply a prescription in *non decimando*. Evidence of length of possession the court can pay no regard to; for the possession must have been unlawful, and the court is therefore bound to decree in favour of the common right. No presumption can be admitted to support a mere simple prescription in *non decimando*. If we depart from this rule, we overturn the whole law upon the subject. But there is a great difference between a claim founded on mere non-payment of tithes, and a claim supported by evidence of actual enjoyment of the pernancy of tithes. The title is not unlawful. A

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good title may have been derived to the party in possession. The title therefore not being simply unlawful, long possession is evidence of the title. The case of *Fanshaw and Rotheram*, stated at the bar, appears to me, from a note I have seen, to have been mistaken. The ground of that determination seems to have been, that however doubtful the case stood as to title, there had been long possession; the claim was of a portion of tithes, the parties might have a good title, and it was not right for a court of Equity to disturb the possession. The doctrine was good applied to that of to this case. There is no difference between a lay impropriator and a rector. The lay impropriator becomes as it were a spiritual person; he holds in the same right. If it is not proper to disturb a possession in favour of a lay impropriator, it is not proper to disturb it in favour of a rector. The arguments at the bar have run wild on the head of presumption. We are to presume so much as to destroy the whole law. For if upon mere possession every thing is to be presumed to maintain that possession, there was no necessity for the statutes of limitation. It will be better for every person in possession to burn his title deeds, and rest wholly on presumption. In the case of the crown and of the church, there is a maxim standing in the way, *Nullum tempus occurrit regi, aut ecclesie*. It is difficult to settle the bounds of this maxim. It is clear that the crown and the church shall in no case be barred by such imputed laches, as would bar private persons: that the statutes of limitation shall not extend to them. Whether the maxim should go farther, I much doubt. With respect to presumption arising from the acts of other persons, I think it ought to have the same force against the crown and the church, as against private persons. In the case of *Alderman and Chitty's will* (c) it was presumed, that the first sheet of the will was in the room at the time of the execution of the second sheet which was attested by the witnesses. Suppose the crown had been interested to contest that will; I think the same presumption ought to have prevailed against the crown, as did prevail against the heir at law. In old recoveries a good tenant to the precipe is presumed. If the crown is a party, there ought to be the same presumption against the crown, as against the heir. Presumption upon the acts of parties ought to be made with as

(c) 3 Burr. 1773.

with force against the crown and church, as against other persons. But nothing is to be presumed against laches of the church, their not claiming. The maxim has there its full force. I have said thus much, that it may not be imagined we have gone too far on the doctrine of presumption. I agree with the Lord Chief Baron upon the ground of great length of possession, and the claim being of a portion of tithes, which might be lawful, that the bill ought to be dismissed.

The other barons concurred in opinion with the Lord C. B. and B. Eyre (d).

The case of Fanthaw v. Rotheram, cited in the preceding case, and determined March 14th 1759 at Lincoln's Inn Hall, appears by the note which was produced in the argument to have been as follows:

The plaintiff brought his bill for an account of tithes. The defendant insisted by his answer that he and they whose estate he had in the lands whereof the tithes were demanded, had a title to the tithes. It was in proof in the cause, that the defendant and those under whom he claimed had been in possession above 100 years; and several conveyances intervening without any claim from the plaintiff or his ancestors, it was insisted, that there had been a severance of the tithes from the rectory; or, that there had been some grant or deed, whereby the plaintiff's ancestors, or those who had the right to the rectory, had exempted the defendant's estate from the payment of tithes.

Lord Keeper Henley.—I will first give my opinion on the points of law made in this case abstracted from any equitable consideration.

(J) *Edwards v. Ld. Vernon*, in the Exchequer 23d February 1781, on a bill brought by a spiritual rector for tithes, the defendant set up a title to the tithes under family settlements and possession for 171 years, as a lay sec. Barons *Eyre, Hotham, and Perryn*, thought the case of *Scott v. Airey* was determined on right grounds "that a court of equity ought not to assist against long possession," and that case having been acquiesced in, they thought they ought to dismiss the present bill, as they did that of *Scott v. Airey*, with costs, and they gave judgement accordingly. After 171 years the court presumed the appointment of a vicar and consolidation with a curacy.

Vide Rot. Parl. 8 & 9 E. 2. A.D. 1315. No. 6. petition of the Bishop of *Durham* to grant of lands in the franchise of *Werk* in *Tyedale*, and the patronage of the church of *Symundburn*.

The

The first question is, whether a man can prescribe in a *non-decimando* against a lay impropriator? And I am clear, that he cannot. The books are all uniform as to this point at the common law as against all spiritual persons: and however obscure the reason of such a rule may be at this day, whether in favour of ecclesiastics, as the books say, or for whatsoever other reason; yet, when it has so long prevailed, though no reason for it can be shewn, it must be presumed, that it took its first rise in some publick utility. And I think, when a point of law is fixed, though the judge, who is to determine, can give no reason for the fixing of it; or, though the reason generally assigned for it, be not satisfactory to him, he is nevertheless bound to determine according as it is fixed, and has no power whatever to depart from the law. I think, however, that this further reason may be given, that if a person could have prescribed in *non decimando* at common law, it would have opened a door to many alienations which the law did not mean to encourage. I am therefore clear in this, that, as at common law a man could not prescribe in *non decimando* against a spiritual person; so neither can he now against a lay impropriator: for the lay impropriator stands exactly in the same light as the spiritual person did before the dissolution of monasteries; and by the grant in this case the rectory undoubtedly became a lay-fee.

The second question is, whether it is not necessary in setting up a discharge from tithes to produce the deed or grant whereby the lands are discharged? which is, in substance, no more than this, whether a man can set up a conveyance from a parson, with the consent of the patron and ordinary, without producing the grant? And I am clear, that he cannot. Regist. 58. By alienation the spiritual fee becomes lay, and is to be determined by the same rules as other lay rights are. In prohibition the person claiming such an exemption was bound to plead it, and specially to satisfy the court of the sufficiency of the discharge: for tithes were of common right due, and, consequently, he was bound to produce the deed whereby he claimed his discharge. *Hob.* 297. and all the books of entries prove this. So is *the Bishop of Winchester's case*, 2 Rep. Therefore, I think that no man at common law could avail himself of a discharge without producing the deed or grant under which he claimed it.

In the next place then consider this upon the statute of 31 H. 8.

By

By this statute the lay impropiator stands exactly in the same situation as the spiritual person did before it was passed. *Com. Rep.* 651. *Hob.* 296. Therefore, as no person can prescribe against the spiritual person, consequently, it is clear, that you cannot set up a general discharge against a lay impropiator. It is to be observed that before the 32 *H.* 8. a man could not sue for tithes in the temporal courts: at common law an appropriation was a spiritual fee, though the spiritual courts could not take cognizance, if a person, who had no right, took away the tithes which were set out; for he was a trespasser, and case lay.

It is true *longa et diuturna possessio* is as strong a title as any in law, and in most cases the courts will presume any thing in favour of it. It is a title to defend upon and to recover upon. But, though this be generally so, yet the case of tithes is an exception: for simple possession was not sufficient against an ecclesiastical person; and if not against him, then not against a lay impropiator, who stands in the same light. Yet I would not be understood, as if a judge would in all cases expect the production of the very deed or grant of exemption; but the best evidence the nature of the case will admit, as that such a grant did once exist, and concomitant evidence, or the like.

Having considered these points of law in the abstract, I will now consider them as applied to the determination which this court must make.

I am of opinion, that this by the grant became a lay-fee: and the dispute as between those entitled to the spiritual fee or rectory must stand on the same foot, and be determined by the same law, as any other right or fee. In this case the plaintiff makes no particular title at all; he would have the court presume, that his right descended to him; but does not shew any one family settlement, &c. for a great number of years (above forty) where this is mentioned; and yet he prays the court to interpose against a possession, which has been in the defendant and his ancestors above a century.

It is urged, that the Law says, *Caveat emptor*; but Equity says, *Teneat emptor*, if he is a fair purchaser. The defendant appears to me as a fair purchaser, there having been several intermediate conveyances, and possession having gone along with them, for above 130 years; and therefore equity will not interpose to disturb him. If the plaintiff has any title at law, let him pursue it. But equity will not interpose against a fair possessor only because the plaintiff

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is afraid his title may fail at law. This is not like a bill to quiet possession, or prevent multiplicity of suits. If I should do otherwise, it would be torturing the titles of the subject.

In *Medley v. Talmy*, *Com. Rep.* 652. there had been only forty years possession. In the present case there has been much longer possession, and there have been several intermediate conveyances to the defendant and those under whom he claims. In *Medly and Talmy's* case the defendant plainly could not make out any exemption at all; and the substance of the case is no more than that equity will not disturb a long possession; and the reporter's observations are certainly impertinent. In the cases of *the corporation of Bury v. Evans*, and *the corporation of Warwick v. Lucas*, the same point is in substance ruled: and as to the second point made there, I must much alter my opinion of the law, before I could concur in it, although, as it is not in judgement here, it is not necessary for me to say any thing upon that head. I take it for granted, that there was no deed of severance in that case. I renounce all concurrent jurisdiction with the courts of law, where the legal title only of tithes comes in question: but, where there is any equity mixed therewith, I agree, that this court will interpose.

I do not know (and I was taxed narrowly on the argument to find) if the two cases of *Medly and Talmy* and *the corporation of Warwick and Lucas* had ever been decreed against, and I do not find they have. In *Evans and Bury corporation* it was a mere legal question, and no equity was mixed with it. The case of *Jennings v. Lettice* in the Exchequer is, according to my note of it, distinguishable from the present case. It would be the hardest thing in the world to dispossess a fair purchaser in equity, when the plaintiff thinks he cannot recover at law. Nay, even the rigour of the law in some cases construes with equity; as in cases of mortgages, and in actions on the case for accidental fire. Therefore, I think the plaintiff entitled to no relief in equity, and dismiss the bill with costs.

The following case of Sawrey v. Collins, which came on by appeal from the court of Exchequer to the House of Lords on 10th Feb. 1772, and is to be found in 6 Br. P. C. 459. was likewise cited and relied upon in argument in the above case of Scott v. Airey.

BEFORE the act of parliament aftermentioned there was founded in the parish church of *Tamworth* a college or collegiate church, consisting of one dean, five prebendaries, and one lay vicar choral; and the dean and prebendaries were parsons of the whole parish of *Tamworth*.

By an act of parliament 1 *Edw. 6. c. 14.* all manner of colleges, free chapels, and chantries, being, or *in esse*, within five years next before the first day of that parliament, (except such as are therein excepted), and all manors, lands, tenements, rents, tithes, pensions, portions, and other hereditaments belonging to them were vested in possession in the king, his heirs and successors; and the king, his heirs and successors, were authorized to appoint commissioners under the great seal of *England*, which commissioners, or any two of them, were directed to make and ordain a vicar to have perpetuity for ever in every parish church, being a college, free chapel, or chantry, that should come to the king's hands by virtue of that act, and to endow every such vicar sufficiently, having respect to his cure and charge; the same endowment to be to every such vicar, and his successors for ever, without any other licence or grant of the king, the bishop or other officer of the diocese. And the commissioners, or two of them, had authority to assign in every great town or parish, where they should think necessary to have more priests than one for ministering the sacraments within the same town and parish, lands and tenements belonging to any chantry, chapel or stipendiary priest, to be to such person and persons as the commissioners should assign or appoint, to continue in succession for ever, for and towards the sufficient finding and maintenance of one or more priests within the same town or parish, as by the commissioners should be thought necessary or convenient.

By virtue of this act, the collegiate church of *Tamworth* was dissolved, and the possessions belonging thereto, together with the parsonage of the said church and parish, came to the possession of king *Edw. 6.* and he issued his commission to sir *Walter Mildmay* and *Robert Ketway* and others, who, in pursuance of the act, assigned a salary of 20 l. a year to the vicar of *Tamworth*, and another

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ther salary of 16 l. a year to two priests (*viz.* 8 l. each) to assist the vicar of *Tamworth*. These salaries were to be paid out of the possessions of the said college; and a mansion house, now called the college or vicarage house, and a garden, in *Tamworth*, part of those possessions were assigned for the habitation of the vicar and as part of his endowment.

The said college and deanery, and the right of patronage of the church and vicarage, and the possessions of the college, (except the house and gardens allotted to the vicar) having descended to queen *Eliz.* in right of her crown, she, by letters patent, dated the 22d of *October* in the 23d year of her reign, granted to *Edmund Downing* and *Peter Aysheton* and their heirs for ever the said college, deanery, and prebends, and the advowson, donation, and right of patronage of the vicarage and church of *Tamworth*, and all tithes, great and small, in *Tamworth* aforesaid, subject to the several yearly reservations therein mentioned; and (amongst them) of the sum of 20 l. payable yearly to the vicar of *Tamworth* for his stipend or salary, and 16 l. for two curates there, for their salaries, payable by the receiver-general of the county, or at the receipt of the Exchequer; and if the grantees paid them, the queen covenanted to allow the same.

By indenture dated the 21st of *February* in the 25th year of the same reign the said *Edmund Downing* and *Peter Aysheton* granted the said college, deanery, and prebends, and the advowson and right of patronage of the vicarage and church of *Tamworth* to *John Morley* and *Roger Rant* in fee simple.

By another indenture, dated 10th of *May* in the said 25th year of queen *Elizabeth*, *Morley* and *Rant* granted the said deanery of *Tamworth*, or prebends of *Amington* and *Wigginton*, and the tithes thereto belonging, and the advowson and right of patronage of the vicarage and church of *Tamworth* to *Thomas Repington* esq. the ancestor of the respondent *Repington*, in fee simple.

Thomas Repington being thus seised of the premises, and particularly of the said advowson and right of patronage, did, by settlement, dated the 2d of *November* in the 1 *Ja.* 1. made on the marriage of *John Repington* his son with *Margaret Littleton*, covenant, that he and his heirs would stand seised of divers premises therein mentioned, (of which the deanery and deanery house in *Tamworth*, and the advowson and right of patronage of the vicarage and church, as belonging to and usually enjoyed with the deanery and deanery house, were parcel), to the use of the said *John* and

Margaret, and their heirs male, in special tail; with remainder to *Humphry Repington* his second son in tail male, and with divers remainders over.

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John Repington and *Margaret* his wife, having by means of the last mentioned deed become seised of the premises comprised therein, he by deed dated the 28th of *August* in the 7th year of king *James I.* nominated and appointed *Samuel Hodgkinson* to be vicar of *Tamworth* for his life, if he should so long exercise the place and preach there once every fortnight at least. This nomination was made on the resignation of the vicarage by *Roger Molde*, who had been the vicar from the 20th year of queen *Eliz.* by her grant and nomination.

The said *John Repington* (then sir *John*) died in the year 1625, leaving sir *John Repington* his son and heir; and he, by indenture, dated the 12th of *November* 1629, did, upon the cession of the said *Samuel Hodgkinson*, nominate and appoint *Thomas Blake* to the said vicarage for his life in manner aforesaid; and *Blake* held the same till his death.

The last named sir *John Repington* died in the year 1662, leaving *Seabright Repington*, his only son; and he on the death of *Blake* by indenture dated the 17th of *December* 1663 nominated and appointed *Samuel Langley* to the vicarage. *Langley* held it during his life, and upon his death, *Seabright Repington*, by indenture dated the 19th of *June* 1694 nominated and appointed *Samuel Collins* to the said vicarage, and he held it till his death in the year 1710, and thereupon *Edward Repington* (the eldest son of *Seabright Repington* who was then dead) by indenture dated the 8th of *January* 1710 nominated and appointed *George Antrobus* to the vicarage.

On the 2d of *January* 1715, the said *George Antrobus*, by the description of curate of *Tamworth*, made oath and declared before the commissioners appointed by the bishop for taking the clear improved yearly value of every parson, vicar, curate, &c. officiating in any church or chapel, that the maintenance of the curate of *Tamworth* did not arise yearly to above 16 l. payable out of the Exchequer; and that the maintenance of the preacher did not arise yearly to above 20 l. payable in the same manner; and thereupon, in pursuance of the act of the 1 Geo. 1. the bishop certified, that the contents of the said declaration were true.

The said *George Antrobus* during his life continued sole incumbent of the vicarage, and received not only the said salary of 20 l. payable

1779. payable yearly to the vicar, but also the said salary of 16 l. a year, or 8 l. a year to each of the two priests or curates, under the denomination of the salary of the curate of *Tamworth*, with all other stipends and benefactions given from time to time to the ministers and curates of the church by several persons, after the dissolution of the college. And he, in right of the vicarage, held the mansion house, garden, barn, and appurtenances, which had been assigned for the residence of the vicar, from the time he became vicar till his death in the year 1724.

On the death of *George Antrobus*, *Edward Repington* by indenture dated the 29th of *December* 1724 nominated and appointed to the said vicarage *Robert Wilson*, who continued vicar till his death, which happened in the year 1758, and received during that time the said salaries of 20 l. and 16 l. and all the other stipends and benefactions; and he likewise enjoyed the mansion house, garden, barn, and appurtenances.

Edward Repington died in 1735, and on his death, *Edward Repington*, his nephew and heir at law, became seised in tail of the said advowson and right of patronage, and all the other premises, by virtue of the entail created by the deed of settlement before stated; and he, upon the death of the said *Robert Wilson*, by an instrument under his hand and seal, dated the 1st of *December* 1758, addressed to the bishop of *Litchfield* and *Coventry*, after reciting that the parish church of *Tamworth* with the perpetual curacy was then void by the said *Robert Wilson*'s death, and that the same of right belonged to his nomination, did certify to the bishop, that he nominated the respondent *William Sawrey* to the said perpetual curacy, and he prayed the bishop to grant his licence to the respondent to officiate in the said church. This instrument was, on the 7th day of the same month of *December*, delivered to the bishop, but he did not think proper to grant such licence.

The last named *Edward Repington* died, leaving *Charles Repington* his brother and heir, who, on his death, became seised of all the premises under the aforesaid entail; and *Edward Repington*, having in his lifetime made a will and appointed his said brother *Charles* executor of it, the latter, upon the death of his brother, proved his will, and became his personal representative.

The said *Charles Repington*, by indenture, dated the 5th of *May* 1759, reciting, among other things, that the vicarage or created vicarage of *Tamworth*, with the perpetual curacy of *Tamworth*, was become void by the said *Robert Wilson*'s death, did give and grant

to the respondent *William Sawrey* the said vicarage together with the said curacy, and did nominate and appoint him to be vicar of the said vicarage, and curate of the said curacy for his life, upon the terms before-mentioned. And by another indenture of the same date, reciting that the said church and curacy were void by the said *Wilson's* death, and that the same had become void in the lifetime of the last named *Edward Repington*, and that he had made his will, and appointed the said *Charles Repington* sole executor, who had proved the same, and that it then belonged to him to make a donation and grant of the said church to a proper curate or clerk in *Wilson's* room; the said *Charles Repington* did give and grant the said parish-church and curacy to the respondent *William Sawrey*.

On the 8th of December 1764, *Charles Repington* died, leaving the respondent *Charles Edward Repington*, his eldest son and heir, an infant; and he, upon his father's death, became seised of the advowson and right of patronage of the said church of *Tamworth*, under the aforesaid entail.

Queen *Elizabeth*, by letters patent, dated the 10th of October in the 30th year of her reign, reciting the commission granted by king *Edward 6.* to sir *Walter Mildmay* and *Robert Kelway*, and their proceedings under it, did grant, that from thenceforth there should be a grammar-school in *Tamworth*, and that the bailiffs of the town should be incorporated for ever by the name of "the guardians and governors of the grammar-school of *Elizabeth* queen of *England*, in *Tamworth*;" and she thereby granted, among other things, that the said guardians and governors and the twenty-four capital burghesses for the time being, or the major part of them, might nominate, appoint, and admit, a fit and learned preacher to serve in the church of *Tamworth*; and also two ministers or curates to serve therein for ever, as often as the same should be void, with the consent and allowance of the earl of *Essex*, or the heirs male of his body, or the under-steward of the earl, or his said heirs male, to such admission. And she thereby also granted to the said guardians and governors a stipend of 20 l. a year payable to the preacher serving in the said church for ever; and another stipend of 16 l. a year payable for ever to two ministers or curates serving in the church, by the hands of the receivers general of the crown in the counties of *Stafford* and *Warwick*, in like manner as they were theretofore paid for such use. And she thereby granted to them all that her messuage with the appurtenances in *Tamworth*, and a garden wherein the late vicars of the college of *Tamworth* used to dwell;

1779. in which messuage the preacher and curates of the town are therein mentioned to have inhabited at the time of making the letters patent, to hold to them and their successors for ever, for the habitation of two ministers or curates serving there for ever.

King *Charles 2.* by his letters patent, dated the 17th of *February* in the 16th year of his reign, made grants to the bailiffs of *Tamworth* similar to those contained in the last mentioned letters patent of queen *Elizabeth*, and incorporated them in the same manner.

The respondents, the guardians and governors by deed poll under their common seal dated the 1st of *December* 1758 by virtue as well of the letters patent of the 30th of queen *Elizabeth* as of the letters patent of king *Charles 2.* with the consent and approbation of lord *Weymouth* their high-steward, nominated, appointed, and admitted the appellant to serve in the said church, as minister and curate there, and gave and granted to him the offices of preacher, minister, and curate of the church, and all profits and stipends thereto belonging, to hold for his life: lord *Weymouth* signed an indorsement on the deed, testifying his consent; and the appellant on the 9th of the same month exhibited the deed to Mr. *Lowndes*, the auditor, and caused it to be enrolled with him.

The guardians and governors also by another deed under their common seal dated the 5th of *January* 1759 addressed to the lord bishop of *Litchfield* and *Coventry*, reciting, that the church of *Tamworth* with the perpetual curacy was then void by the death of *Wilson*, and that the same of right belonged to their gift of nomination, certified, that they thereby, with the consent of their high-steward, nominated the appellant to the perpetual curacy with the stipends thereto belonging; and prayed his lordship to grant him a licence for the same. Lord *Weymouth* signed his consent, and the bishop granted the appellant a licence accordingly.

In *Easter* term 1759, *Charles Repington* sued out a *quare impedit* against the respondents the guardians and governors, the twenty-four capital burgesses, and the appellant; and three several issues were tried thereon by a special jury, at the summer assizes for the county of *Stafford* in 1761, upon which trial all the issues were found for the plaintiff *Charles Repington*; whereupon the respondent *Sawrey* entered upon the duty of the said living, and took possession of the keys of the church, and officiated therein, and served the chapel belonging thereto. But the appellant *Collins* got possession of the vicar's house, and occupied the same, and received the salaries of 20 l. *per annum* and 16 l. *per annum*.

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In *Michaelmas* term 1761, the respondent *Sawrey* brought an ejectment in the court of Common Pleas, on his own demise, against the appellant, in order to recover the possession of the vicarage house and garden; and the same came on to be tried at the summer assizes in 1763, for the county of *Warwick*; and upon the trial, the appellant's counsel insisted, that the respondent ought to prove either admission and institution, or a licence from the bishop; but the respondent not being prepared to prove a licence, a verdict was found for the appellant. However, in *Easter* term 1763, the judgment upon the verdict in 1761 was arrested, by reason of a mistake in the pleadings.

In *Michaelmas* term 1763, the respondent *William Sawrey* exhibited his bill in the court of Exchequer against the appellant, the respondents, the guardians and governors, *Frederick*, lord bishop of *Litchfield* and *Coventry*, and the said *Charles Repington*; praying, that the appellant might be decreed to come to an account with him for all sums of money, stipends, rents, surplice fees, and other perquisites due and usually paid to the vicars of the said church, which had been received by him, or any one to his use, from the time the respondent *Sawrey* was nominated vicar; and also for the rents and profits of the vicarage house, and all other the lands and estates belonging to the vicar, received by the appellant, or paid to his use, and might be decreed to pay to the respondent *Sawrey*, what should appear due on the balance of such accounts; and that the appellant might also be decreed to deliver up to him the possession of the said house and lands, and that he might be quieted in the possession thereof; and that the appellant might deliver up to the said respondent the parish registers and all other papers in his custody relating to the church and parish, and usually kept by the vicar; and that in case the respondents the guardians and governors, and the appellant and the bishop, or any of them, should pretend any right or title to the advowson, donation, or right of patronage to the vicarage or curacy; or in case any doubt should arise touching the nature of the incumbency of the church, or whether the same was a donative vicarage, or a perpetual curacy, or in whom the right of patronage, donation, nomination, presentation, or appointment of the vicar, preacher, minister, curate or curates of the church was then vested, and to whom the same did then of right belong; then that such right and the several matters aforesaid might be tried in one or more proper issues, to be directed by the court. And that

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the bishop might be decreed, if the same should appear necessary, to grant the respondent *Sawrey* licence to preach in the church, or admit him to the same; and in case he had granted any licence to the appellant, that he might be decreed to recal it.

The appellant *Collins* put in a demurrer to part of this bill, and for cause of demurrer said, that the plaintiff's pretended right to the several accounts prayed by the bill and the payment thereof, and the rents and profits and possession of the vicarage house and lands, was merely a right subsisting at law, and only and properly triable by a jury, and to be determined by the common law.

This demurrer on argument was over-ruled by the court, on the 10th of *December* 1764, and soon afterwards the respondents the guardians and governors, and the 24 capital burgesses, put in a plea and answer; and by their plea insisted, that the plaintiff's right, if any he had, to the said church and cure, was a matter triable at law; but on arguing this plea, it was over-ruled on the 25th of *February* 1767: from which orders, neither *Collins* nor the corporation thought proper to appeal, but afterwards put in their respective answers to the bill, and thereby insisted, that upon the construction of the several grants of the crown under which the *Repington* family and the corporation respectively claimed the right of nomination, such right belonged to the corporation; and the appellant *Collins* hoped, that his right, under their nomination, would be established.

Pending the suit *Charles Repington* died, and was succeeded in his estates by the respondent *Charles Edward Repington*; against whom the proceedings were duly revived.

The cause being at issue, came on to be heard before the barons in *June* 1768; and they having taken time to consider, did, on the 24th of *November* following, order and decree, that it should be referred to a trial to be had between the parties at law, in a feigned action, to be for that purpose brought in the office of pleas of that court, to try the several issues following: 1st, Whether *Charles Repington*, brother and heir at law of *Edward Repington*, or any person claiming by, from, or under them, or either of them, was before, and on the 5th day of *May* 1759, seised of or entitled unto the advowson of the vicarage and church of *Tamworth*? 2d, Whether the respondent *William Sawrey* was before and at the time of exhibiting his bill in the cause lawfully appointed vicar of *Tamworth*? 3d, Whether the same respondent was entitled to the house formerly belonging to the vicars choral of *Tamworth*? And 4th, Whether the same respondent was entitled to the stipends or salaries
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of 20 l. 8 l. and 8 l. of the curates of *Tamworth*, or any or either and which of them ; and the usual directions were given concerning such trial.

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From this decree the appellant appealed to the House of Lords, and on his behalf it was argued, that the ancient law had so much regard to plenarty and to the peace of the church, that if the clerk of a usurper was admitted, the rightful patron lost his turn of presenting for that vacancy : but the statute of *Westminster 2d* gave the action of *quare impedit*, provided it be brought within six months after the church becomes vacant. That in the present case, Mr. *Repington*, the patron, had availed himself of that action, and it had been determined against him. It was immaterial on what point it was so determined, because the determination was conclusive. But, if after the six months elapsed, and after the patron had failed in his suit, and was precluded from commencing any other, his clerk might prefer his bill in a court of Equity, praying issues to be directed to try a right which was merely legal, and for an account of the profits of a benefice, which the incumbent who had been duly instituted had a legal right to retain ; the policy of the law, in giving the action of *quare impedit*, and in limiting the time in which it should be brought, and the damages to be recovered by it, would be entirely defeated : and upon this ground it was apprehended, that the court of Exchequer, as a court of Equity, ought not to have retained the respondent *Saurey's* suit, but his bill should have been dismissed.

Supposing, however, that the subject matter of the bill was properly within the jurisdiction of the court, and that the respondent *Saurey* was entitled to every part of the relief prayed by his bill ; yet the order directing these issues was conceived to be very improper : for the questions to be tried by them depended upon written evidence which was before the court ; and principally upon the construction and effect of the grant to *Downing* and *Aylsheton* : and therefore the court ought not to have directed issues to be tried before a single judge, by a jury at an assize, but should themselves have determined the cause ; as the evidence, to which both parties referred themselves, was fully before them.

On the other side it was contended, that the court of Exchequer, as a court of Equity, had a jurisdiction to entertain the suit ; the relief prayed being an account of profits received by the appellant, and for a delivery of the parish registers and other muniments belonging to the church ; all which were heads of relief proper for a court of equity. The bill also prayed, that the bishop might recal

1779. his licence to the appellant, and grant one to the respondent *Sawrey*; which it was presumed the bishop would think fit to do when the right was determined. And as the relief depended upon the question of right, the bill therefore further prayed, that issues at law might be directed to determine the right, as incidental to the relief prayed: and the question upon the right being a legal question, the court had directed such issues as would effectually decide it, and be a foundation for granting the relief prayed by the bill. As to the objection that the right being a matter merely triable at law, a court of Equity ought not to have entertained the bill; it had already been determined and over-ruled both upon the plea and the demurrer; and therefore to persist in it any farther was vexatious. The relief prayed, was such as a court of Equity alone could decree; and therefore the bill ought not to have been dismissed: and the question of right being a legal question, the court did well in sending it to law to be tried, reserving the consideration whether they should relieve the party or not, till the event of the trial should be known.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed; and the decree therein complained of, affirmed.

Tr. 19 Geo. III. A. D. 1779. Scac,

Evans and Shaddock v. Green. [MS.]

THIS was a bill by the lessees of the vicar of *Fulham* against a gardener for subtraction of tithes. The plaintiffs received a notice from the defendant that he should set out his tithes every day except *Sundays*, as they became fit to be gathered for the market. The defendant in consequence of this under colour of setting out the tithes fairly, it was alleged, studiously threw out the refuse of his garden, and otherwise conducted himself in a fraudulent manner to the prejudice of the plaintiffs. It was insisted by the plaintiffs counsel, that the evidence was so full, so clear, and so circumstantial, as to render the case too clear to need the interposition of a jury: seventeen witnesses must be perjured, if the merits were not with the plaintiffs: that no such consequence could follow on the other side, as there was only some general swearing by some servants that when the fruits were gathered the tithes were fairly set out:

out: that if there were any doubt, they admitted an issue would be necessary; but that here there was no doubt at all.

Eyre B.—The single question is, whether the tithes have been fairly set out. It is admitted the plaintiffs have given very forcible and weighty evidence, and that pointing to particular facts. On the other side, there is a general evidence which goes to a general contradiction, or denial of the particular evidence on the part of the plaintiffs. The substance of all the evidence on both sides is this. Ten or eleven witnesses speak to particular instances of not fairly setting out the tithes, particularizing the manner, &c. This evidence unanswered would indeed be clear proof of subtraction of tithes. But the defendant's witnesses say, that in no case within their observation (and they have had constant opportunity of observing) was there any unfairness, but that the tithes were fairly taken promiscuously; that they were not of inferior value, nor were there any improper attempts to conceal, &c. Now these assertions cannot be true, if the plaintiffs' instances are true. This therefore is positive as much as the plaintiffs' evidence, though not equally satisfactory. The question therefore is, Whether the court ought to decide upon this evidence, or to send it to a jury? If they are bound to decide, there is little doubt in favour of the plaintiffs, because their evidence is particular and strong, and if the witnesses have not spoken the truth, they are liable to be indicted for perjury.

On the other side, the evidence is more general, and less open to perjury. But there is a further difficulty—the plaintiffs bill on the ground of fraud states generally inferior value, secreting, unreasonable hours, &c. On this there is an issue and proof. The plaintiffs prove in the interrogatories the general allegations by particular facts. The defendant cannot encounter this evidence but in a general way, not knowing before-hand the particular facts. If therefore the court were to give to the plaintiff credit as to proof of particular evidence, it seems as if it would not do justice to the defendant. If then the intervention of a jury be necessary, what is to be done? The difficulties of an action will be great, as to the length of time, the minuteness of the articles, &c. The court ought therefore (if possible) to prevent these difficulties, and the mode seems easy. It may be by confining the period to two or three months, and letting the rest abide that, because by the whole case it seems as if the course of setting out the tithes during the whole time were the same. Let the issue therefore be whether, fairly set out during the months of *October* and *November*.

Hotham and *Perryn B.* concurred.

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shilling must have been adequate to the whole value in the time of *Richard* the first. They cited the cases of *Benson v. Olive*, (*supra* 701.) and *Ekin v. Pigot* (*supra* 783.) in which last case Lord *Hardwicke* over-ruled a farm modus for rankness.

Hill Serjeant, for the defendant in equity said, that he would not contend but that the court may decide upon a modus where it is evidently rank; but that if any supposition will save it, it ought to be made; that the modus in this case was not larger than many which had been allowed; that if so, it was not necessarily rank; that the existence of the modus was the point in issue; that the value found might tend to disprove its existence, but that if its existence was found, rankness could be no objection; that here the existence was found; that nothing else was found, for the indorsement was the judge's. In *Pole v. Gardiner* (*supra* 601.) it was objected to moduses of 12 d. an acre for low meadows, and 8 d. an acre for high meadows, in lieu of tithe of hay, that they were rank; that they could be only temporary, by reason of their largeness; that the hay of a whole acre was anciently not worth the amount of the tithe at that rate. However, upon the appeal to the House of Lords issues were directed. And there the appellants say there is no rule of law to limit the value of moduses; that they were all originally contracts or compositions real; and the owner might endow with more than the real value; and a farthing an acre would be too much on a rigid adherence to value in the time of *Richard* the first. It appears from *Vin. Abr. tit. Dismes, D. a. pl. 47.* that the decree of the court of Exchequer in this case was reversed, according to Lord *Harcourt's MS. tables, because churches might have been endowed with more than the value of the tithes.* In the case of *Gifford v. Webb* (*supra* 708.) there was a decree against the rector of *Stoke* in *Surry* for a modus of 3 d. for a lamb; which decree was affirmed upon an appeal to the House of Lords. He said, that the notion of rankness being sufficient to enable the court to determine upon a modus was first taken up by Lord Chief Baron *Ward*; that *Pole v. Gardiner* was in his time; that the notion was not warranted by antiquity, and it was condemned almost as soon as it prevailed. The value of lands at different periods was exceedingly uncertain; it varied from the accidents of inclosure, depopulation, &c. and no certain conclusion could be drawn from the present value; in *Chapman v. Smith* (*supra* 857.) Lord *Hardwicke* mentions the case of *Grasscombe* and *Jefferies*, where a modus of 12 d. an acre was sent to a trial. In the case of *Sansom v. Shaw* (*supra* 806.) *Mich. 1748* in C. P.

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on a motion in arrest of judgement in prohibition upon a modus of 10d. an acre payable by all but towners for pasture and meadow ground, two objections were taken; 1st, That the modus was rank, and therefore could not have been before time of memory; 2d, That it was uncertain in excluding towners. *Belfield* shewed cause, and said that *Lord C. B. Ward* first introduced the doctrine of rankness. *Lord C. J. Willes* said he could not comprehend the ground of it; that it was not likely the owners would pay more than the value of the tithes; but that we were to go not upon presumptions but proof; that the time of *H. 6.* is as immemorial now as the time of *R. 1.* was at the time of the statute of *West. 1.* *Littleton* states two opinions with respect to prescription; the last was probably his own. In 2 *Ro. Abr.* 269. *pl.* 16. *Lord Rolle* states it as his opinion, that the time of memory at this day should be limited to sixty years; but he admits the practice to be different.

Cust on the same side argued, that the case of rankness was not now before the court upon this indorsement; that it never could be brought before the court after verdict; that the first case of rankness was *Grasscombe v. Jefferies* 17th November 1687 on this modus; *Lord Hardwicke* had a note of it from *Mr. Ward*; the modus was at first holden to be rank, but that decree was reversed on a rehearing; that the next case in which rankness was brought forward was that of *Pole v. Gardiner*; that that was in queen *Anne's* time, just after *Sacheverell's* trial, when the cry "The church is in danger" was up; that in the year 1729 the case of *Chapman v. Monson* was determined, when the Lord Chancellour and two judges established a modus of 4d. an acre; that the modus in *Chapman v. Smith* was established after a trial at law; that in *Gifford v. Webb*, the court went upon the case of *Pole v. Gardiner*, and directed an issue, which direction was affirmed by the House of Lords. He said, that he was of counsel in the case of *Sansom v. Shaw*, when it was tried at *Lincoln* assizes before *Lord C. B. Parker*; that they had a rule to be at liberty to move for a new trial if they did not succeed in the motion in arrest of judgement; but they never did move for a new trial; that in that case the largeness of the modus was holden to be nothing else than a mere circumstance; that it was evidence to a jury; and *Lord C. J. Willes* said they do not carry it farther than 60 years, because of the statute of *Eliz.* In the case of *Richards v. Evans*, 1 *Vez.* *Lord Hardwicke* takes a distinction between a case on the value of lands, and one on the value of specifick things;

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things; that history settles the one though not the other; that it was exceedingly difficult to ascertain the value of lands at a distant period. He said that the question to be tried in the present case was not, whether a composition before the 13th of *Eliz.* is reasonable, but whether it existed. In considering these compositions, he said, all idea of bounty was not to be excluded; that it might be a beneficial bargain in prospect of future advantage, though half the lands of the parish were given; that the case of *Pyke v. Dowling* was undistinguishable from the present case, upon the point of that being concluded by the verdict; that the present case supposed the fact of the existence of the modus; that the defendant at law called no witnesses to disprove it; that the court therefore could not say that the fact so found is not true. The only question referred to them is, whether upon the fact proved of the value of the lands the verdict is wrong; a question which the fact found of the existence of the modus does away.

Lord C. B.—Courts of Equity deciding upon facts and law often decide on the fact appearing in evidence before them; and in questions of modus on bills for account of tithes, have frequently formed their opinion on the internal evidence of the modules, and have decreed accordingly. But in one like the present they have often sent it to a jury to try whether immemorial or not. It is of necessity that the jury must decide and draw their conclusion from all the facts; and therefore, on the present occasion, it was the province of the jury to draw the conclusion. The question then is, Have they so done? It is said they have, for the finding is, that the occupiers for the time being of the meadow and pasture land in the declaration mentioned, have, from time immemorial, constantly paid, &c. And to be sure, if they have satisfactorily decided the question, this court can make a decree upon their finding. But it appears most manifestly from the indorsement, that the judge conceived the inference to be drawn was an inference of law and not of fact. If so, it was impossible that the jury should be informed by the judge, or apprized that it was their business to draw the conclusion of fact. Satisfaction therefore has not been had by this trial, and satisfaction must be had before we can make a decree.

Eyre B.—The issue was directed for the satisfaction of the court. The indorsement cannot be rejected, because made according to the directions of the judge; and if read, it proves his opinion that rankness was matter of law arising on the fact proved. The first ques-

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tion then is, Is it matter of law? Certainly not, as now settled, as well as from the reason of the thing. Second, If it be matter of fact, only, Can the court make a conclusion of law where no conclusion of law arises? Certainly not. And it is equally impossible to decide on the facts as found. It is said, that if it be to be considered as a motion for a new trial, we must have the report of the judge before whom the issue was tried; but that is not necessary here, because it is sufficiently certified by the indorsement. No satisfactory trial has been had in this case, because a matter of fact has been taken for a matter of law. It is not enough to say the matter was talked of before the jury, and that they might have decided upon all the grounds; they ought to have had it put to them as a part of their duty.

The other barons concurred, and a new trial was directed, upon which a verdict was found for the defendants, the rectors.

H. 20 Geo. III. A. D. 1780. Scac.

Hutchins v. Maughan. [MS.]

THE plaintiffs, trustees under the will of *Nathaniel* late Lord *Crewe*, baron of *Steau*, and lord bishop of *Durham*, deceased, stated that they had been for six years past seised in fee of all the tithes, great and small, arising in the chapelry of *Shotley* in the county of *Northumberland*; that the defendants for three years past had occupied therein land, which was part of a piece of ground called *Balbeck Common*; that they had respectively growing thereon oats, rye, barley, peas, and turnips, which they had reaped, pulled, and carried away without setting out or paying the tithes thereof. The bill therefore prayed an account and payment.

Newly inclosed lands which will not produce crops by the ordinary means of culture are entitled to exemption for seven years under the statute 2 & 3 E. 6.

The defendants admitted that the plaintiffs were owners of the tithes of corn, grain, and other predial and small tithes arising in the parish of *Shotley*, except such hay-tithes or moduses in lieu thereof, and small tithes, as the curates of the perpetual curacy of *Shotley* were entitled to; that they had in the said years severally occupied land in the said chapelry, part of a certain moor, common, or tract of waste land within or parcel of the manor of *Balbeck*, called *Balbeck Common*, from which they had reaped and carried away
corn,

1780. corn, grain, peas, turnips, and meslin, without setting out or paying to the plaintiffs the tithes thereof; for that, by 5 G. 3. for dividing and inclosing *Balbeck Common*, or the said tract of waste land in the barony or manor of *Balbeck*; and by the 2 & 3 Edw. 6. c. 13. the several parcels of land so occupied by them respectively were exempted from the payment of tithes for seven years after the improvement thereof.

The witnesses, whose depositions were read on the part of the plaintiff, deposed that *Balbeck Common* was not naturally barren and unfruitful; that it was rendered fit and proper for tillage by the ordinary course of husbandry used in moor lands, that is by paring, burning, and liming; that following this course, and adding two, three, or four fothers to an acre, the land had produced tolerably good crops; that after the first crop had been raised, no other expence or extraordinary labour had been employed, than was required in lands in general; that the crops of some of the occupiers had been equal to the crops on some adjoining ancient improved lands; that the produce of one crop would not repay the expences of cultivation, but that the produce of three crops would reimburse all expences whatsoever, and something more.

On the part of the defendants, the deposition of one *Cuthbert Robinson* was read, which stated, that he, the witness, had been accustomed to husbandry from his infancy, and was well skilled in land. That no considerable part of the common would or ever did grow or produce a valuable crop of corn, grain, or other fruits by the ordinary means of culture used in the country with respect to fertile and improvable grounds upon their being converted from grass to arable lands; but that it would be absolutely necessary in order to obtain a crop of corn, &c. of any considerable value, to pare, burn, and lime or manure, or to pare, burn, and dung or soil the same in an extraordinary manner and at a very extraordinary expence: that seven years ago *Swinburne*, one of the occupiers, ploughed seven acres of the best ground in his allotment of *Balbeck Common* and winter fallowed it; after cross-ploughed it and harrowed it, and then gathered up and burnt the clods or turves upon the ground; then sowed it with oats: that the crop produced was exceedingly bad, and in his judgement would hardly pay the expence of reaping: that a great part of the oats was so thin and short, that it could not be cut, and was therefore left on the ground: that in the last spring *Hopper*, another occupier, pared
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about thirty-eight acres, and sowed rape-seed on eighteen acres, and set turnips on twenty acres: that he did not lime or manure them: that the crops were exceedingly bad, though the season was remarkably good: that he almost daily viewed them; and that the rape was not of more value than twenty shillings.

Upon this evidence the court ordered the bill to be retained until *Michaelmas* term, with liberty to the plaintiffs in the mean time to bring an action upon the statute of 2 and 3 *E. 6.* against all the defendants for the recovery of the tithes demanded by the bill; the plaintiffs in such action to state all the lands to be in the joint occupation of the defendants, and the defendants to admit the same, and also the title of the plaintiffs to the tithes, and to insist on the benefit of the statute only.

A verdict was found for the defendants, and upon the cause coming again on 7th *February* 1782, the court ordered the bill to be dismissed with costs both at law and in equity.

Tr. 20 Geo. III. A. D. 1780. Scac.

Jones v. Snow. [MS.]

LORD C. B.—This is a bill by the rector of *Shipston upon Stour* with the chapel or parish of *Tidmington* in the county of *Worcester* annexed for an account of all tithes. Tithable matters are admitted on the other side, but the defence insisted upon is, an exemption by virtue of an agreement between a predecessor of the plaintiff and the parishioners, confirmed by a decree in Chancery. The agreement, which was in 1652, was for the division of common fields in *Tidmington*, in which a part was to be given in lieu of glebe. A bill was filed by the lord of the manor to carry it into execution, stating the rector's claim, and his requisition of a money payment in lieu of tithes. The decree was made by consent of all parties. In answer it has been said shortly and cogently, that in the *Attorney General and Blair v. Cholmley*, *Ambl.* 510. Lord *Northington* determined, that such a decree was not conclusive upon the rector, and that decree was confirmed upon appeal. Thus the law is settled. But it has been insisted, that the present case differs from the case cited. One point of difference insisted upon is, acquiescence. But that has no weight; nor does any acquies-

A decree in equity confirming an agreement for the acceptance of land in lieu of tithes is not binding on the succeeding incumbent, though sanctioned by the concurrence of all parties interested. See *Cartwright v. Colton*, *P.* 19 G. 3. 4 Wood's Decr. 88. S. P.

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cence appear after the plaintiff knew his right. Again, it has been said, that Lord *Northington* would not have so decreed, if allowance had been made for increased value, and here such allowance has been made. But there is no evidence of this. Again, it has been insisted, that an act of 6 G. 1. has operated as a virtual confirmation of the agreement. But that act, upon examination, appears to have no such effect. If, therefore, there is no difference between this case and that of the *Attorney General and Cholmley*, the decree must be the same; but we give no costs, after so long an acquiescence.

Tr. 20 Geo. III. A. D. 1780. Scac.

Hutchins v. Full and others. [MS.]

THE plaintiff, as rector of *Dittisham* in the county of *Devon* filed his bill against the defendants, stating that they, the defendants, had respectively had large quantities of milk from their cows in the said parish; and that he, the plaintiff, was entitled to the tithes of the whole herd of cows belonging to the said defendants respectively; and that the said defendants had neglected to set out the said tithe of milk fairly and legally, or to make any satisfaction for the same, and therefore praying an account thereof.

The defendants, by their answers, admitted the plaintiff's institution and induction, and that they had respectively kept several cows, from which they had respectively large quantities of milk, and that they had constantly set out fairly the tithe of the said milk, in the manner therein set forth and stated, and which is as follows, viz. "by setting out the tenth meal of the milk of each of the cows kept by the defendants, as such cows came to the pail, or first came in milk, and the tenth meal together of all such cows as happened to come in milk on the same day; which method is, as they alleged, agreeable to the custom immemorially used in *Dittisham*, in setting out the tithe of milk, as they had heard and believed; and which custom they presume to be a fair, just, and reasonable one; as thereby the plaintiff would have the tenth meal of milk of each cow of some mornings and some evenings throughout the parish, as the cows came in milk, and thereby the defendants would also daily have milk for rearing of calves, and for the use of their respective families, which would not be the case if they were to set

out

out the whole of their milk every tenth day, or the tenth meal of each of their respective herds of cows at once," wherefore they insisted, that such custom should be established, and that the defendants should not be decreed to account for the tithes of their milk.

To which answers the plaintiff replied, and a commission issued for examining witnesses on the part of the defendants only, and they gave evidence in support of their answers.

The cause came on to be heard, when after full debate the court held the custom to be an unreasonable custom, because liable to an easy fraud, and therefore void. They at the same time, declared, that both the court of Exchequer and the House of Lords had determined the case of *Bosworth v. Limbrick* upon this principle, that no other method of tithing would secure to the parson the full tenth of the produce.

An account was therefore decreed with costs.

From this decree the defendants appealed to the House of Lords, alleging the following reasons:

1. Customs of setting out all tithes have almost constantly resulted from experience of mutual advantage to the owners of the tithe and occupiers of the tithable property; and particular circumstances of the extent of situation, &c. &c. will make those customs which are upon that principle of mutual advantage reasonable in one parish, unreasonable in another; and it is therefore almost impossible for those who live at a distance from those parishes, and are not apprized accurately of these circumstances, to exercise a fair judgement upon the legality or illegality of the local custom. For which reason it appears to be necessary in all cases where the legality of a custom is disputed in courts of Equity, that an issue at law should be directed, and the fact ascertained by a verdict in the county which is the scene of the dispute. With a view to this principle, ecclesiastical courts have been, from the earliest periods of our law, restrained by prohibitions to their proceeding when customs or moduses are in dispute, their trials not being by juries. Such being the known practice of the common law courts, in their control over the ecclesiastical courts (the practice in which and courts of Equity is very similar) courts of Equity should impose a similar control upon themselves.

2. Courts of Equity have decreed against customs to pay less than a tenth part in kind, as unreasonable, being only a part of the tithe in lieu of the whole. In this present instance no such custom is averred; the appellants set out in their answers a custom of pay-

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ing a tenth part; they have given evidence of such custom and of the fact, that they punctually observed it in a fair and just manner; there was no evidence to the contrary, nor were any circumstances of fraud alleged on the part of the respondent, which he would not have omitted, had there been any foundation for such a charge.

3. The tenth part of almost every species is due by law *toties quoties* as it may arise; nor can a doubt be entertained but that as milk daily renewed, the tenth part of each day's produce, if not of each meal, was originally due for tithes. But mutual ease and convenience in different parishes have established a variety of customs in setting out the tithes of milk, and of moduses in lieu of them: in many parishes every tenth morning's meal for a certain portion of the year, and every tenth evening's meal for the remainder of it, is the custom: in others, every tenth meal: in some, a certain quantity of cheese; and in others, a very small sum has been taken in lieu of the tithes of milk. In the present case every tenth meal of each cow is the custom computed from the time she comes in milk, which is a determinate period from the birth of her calf; so that no fraud can be put in practice, to put all the tithe-milk into an evening's meal, but the same is duly set out mornings and evenings; and nothing appears in the present instance, but that as many meals of milk were set out in the mornings as in the evenings. The present instance seems to be supported by the constitution of archbishop *Winchelsea*, that "the tithe of milk shall be paid from the time of its first renewing," &c. *Limwood* 199. The renewal of milk is certainly from the usual time of milking after a cow has had a calf, and this custom is what the appellants claim, and what they have punctually observed. It is a custom founded not only on this constitution, but on mutual convenience to the respondent and the appellants, the parish lying within very narrow limits, and the several farm houses in it lying at a distance extremely convenient for the tithe-gatherers to collect the tithe-milk from all of them. From this custom, therefore, the respondent and appellants derive mutual benefit, each receiving a daily constant supply of so necessary an article as milk; and it occasions less trouble to the respondent to send round every day after his tithe-milk, than for the generality of farmers to tend and milk their cows. And as to throwing away the milk at the next milking season after setting it out, where the vessels are wanted, it is a custom well known to be warranted by judicial determinations.

4. The

4. The present decree, it is supposed, was founded on the recent case of *Dr. Bosworth and John Limbrick*, but it is contended is not in any respect similar to this: in that case no particular custom was claimed or proved; in this, a custom is the subject in dispute, and has been proved: in that case many circumstances of deceit and unfair practice were evident; in this, not a circumstance of that kind appears: in that case it was proved, that a full tenth part was not set out; in this, proof has been given, that a full tenth has been set out. There is no similitude therefore between the two cases.

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It is a circumstance attendant upon tithes in general, and on those of milk in particular, that they cannot be collected, without some degree of inconvenience, and whoever becomes entitled to them, must accept them liable to those inconveniences. It is demonstrable to those who know the situation and extent of the parish of *Dittisham*, that the mode of setting out the tithes of milk, which the respondent expects by every tenth day's milk, must be attended with great inconvenience, and much more than would arise from the custom which the appellants claim; because it is clear, that every rector will become entitled, on the tenth day after his institution, to all the milk in his parish; so that in a parish of large extent, and in which there are large dairies, and even in the parish of *Dittisham*, he would find much trouble in collecting all the milk on every tenth day; his dairy should be as large as all the dairies in his parish; it would be necessary for him to have as many pans or vessels to contain his milk as all his parishioners together; in short, on every tenth day he would be deluged with milk, and upon the intervening days he would have none. The inconvenience which would attend this mode of setting out the tithes of milk, as to the appellants, by depriving them of milk for their calves and other purposes of domestic use, is too obvious to be pointed out; and it can be of no other advantage to the respondent to establish the mode of tithing which he contends for than to give him the power of demanding an exorbitant price for the tithe of milk, or of taking it in kind from those who have incurred or may incur his displeasure, in a manner the most inconvenient and oppressive.

In support of the decree the plaintiff stated the following reasons:

1. The established course of setting out tithe-milk is, that the entire meal of the whole herd of cows should be set forth every tenth day, both the morning and the evening's meal.

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The custom, as laid in the appellant's answer, is unreasonable and illegal; it would be so expensive and inconvenient for the respondent to collect the tithe-milk, according to the supposed custom, that it would not be worth collecting.

2. If the custom was good in law, yet it is not so precisely and formally pleaded, as is necessary and required by courts of law and equity.

3. If the custom was good and well pleaded, yet it is not supported by evidence; nor was there evidence sufficient given in support of it, to warrant the court to direct any issue respecting it.

June 13, A. D. 1782.

Ordered and adjudged, that the appeal be dismissed, and that the decree therein complained of be affirmed, with one hundred pounds costs.

H. 21 Geo. III. A. D. 1781. Scac.

Adams v. Waller; et c. contra. [MS.]

THE bill stated, that the parish of *Kensington*, in the county of *Middlesex*, consisted of a rectory and vicarage; that the vicarage was endowed; that the vicar thereof was, by endowment, prescription, or otherwise, entitled to a moiety of the tithes of corn, grain, and hay; to the whole of the small tithes; and all offerings, oblations, obventions, and other vicarial dues, yearly arising within the whole of the parish, particularly to the tithes of wool, lambs, milk, eggs, fruit, herbs, cabbages, potatoes, turnips, garden-stuff, plants, flowers raised for sale, pines, melons, grapes, hot-house plants, flower-roots, hemp, flax, and honey; that the defendant *Waller* was, in the year 1770, collated to the said vicarage, and had ever since been vicar thereof, and entitled to the tithes aforesaid; that he shortly before the 8th of September 1777 let the tithes of that part of the parish which lies on the north side of the king's highway leading from *Hyde Park Corner* to *Counter's Bridge* to *J. Hall*, to whom the plaintiff and other occupiers of farms in that part of the parish paid their tithes after the rate of twelve shillings an acre yearly for the arable land, and seven shillings an acre yearly for the grass land; that he the defendant, *Waller*, also shortly before the said 8th day of September 1777 agreed to let the tithes of the other part of the parish, which lies on the south side

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of the king's highway leading from *Hyde Park Corner* to *Counter's Bridge* (which consisted chiefly of nurseries and garden grounds, and was of much greater yearly value to the occupiers than arable and meadow grounds) to the defendant *B. Bryan*; that in consequence of such agreement, he the defendant, *Waller*, delivered a notice on the 12th of *September* 1777, dated the 8th of the said month, to each of the defendants and others occupiers of nursery grounds and lands in that part of the parish which lies on the south side of the king's highway aforesaid, addressed to them respectively as follows: "Please to take notice, that the composition to be paid for the tithes of land in your occupation will determine on *Michaelmas-day* now next ensuing; and that I have let such tithes to *Benjamin Bryan* from that day, to whom you are hereby desired to account for the same;" that *B. Bryan*, between the 20th and 27th days of the said *September*, delivered to each of the defendants and other occupiers of the said nursery grounds and lands, a notice, dated the 10th day of the said month, signed by him, and addressed to the said defendants and others respectively, as follows: "Please to take notice, that I shall take the tithes in kind for the land you hold in the parish of *Kensington* from *Michaelmas* next;" that *Waller*, in consequence of such agreement, by indenture dated the 27th day of the said *September*, demised to *Bryan*, his executors, &c. from *Michaelmas* 1777 for the term of six years all his said tithes yearly arising within that part of the parish which lies on the south side as aforesaid, at the yearly rent of 280 l. with certain provisos as therein mentioned; that the plaintiff soon afterwards agreed with *Bryan* for an assignment of such lease; that the said plaintiff, on or about the 27th of the said *September*, delivered to each of the said defendants and other occupiers of nursery grounds and lands in that part of the said parish a notice in writing signed by him, and addressed to the said defendants and others, respectively dated on or about the 27th day of the said *September*, as follows: "Sir, Having taken your tithe of Mr. *Bryan*, I hereby give you notice not to move any of your crops after *Michaelmas-day* next ensuing the date hereof, without giving notice that the same may be properly tithed; and for your conveniency, I will accept of notice sent for me at Mr. *Bryan's* house in *Earl's Court* for to come and tithe the same." The bill then stated, that the defendants before *Michaelmas* 1777, and ever since, had occupied lands, particularly nursery grounds and gardens, within that part of the parish that lies on the south side as

1781. — aforesaid; that they had respectively cut, plucked, gathered, pulled up, received, had, and taken, upon and from the said lands, nursery grounds, and gardens, divers quantities of trees, shrubs, fruit, herbs, greens, cabbages, collards, potatoes, turnips, and various other kinds of garden-stuff, plants, roots, flowers for sale, pines, melons, grapes, hot-house plants, and flower roots of various kinds, hemp, and flax; that they had also since such time kept and fed on the said lands cows, which yielded and produced milk and calves; and had also kept ewes and other sheep, from which they had lambs and wool; that they had geese, ducks, hens, and other poultry, which laid eggs; that they also had kept several hives of bees, which produced honey; and had also divers other tithable matters and things from the said lands, nursery and garden grounds, the tithes of which were accounted small tithes; that the tithes of the said matters and things ought to have been set out for the plaintiff, who had applied to them to set out and pay him the said tithes, or make him a satisfaction for the same, which they had refused to do, under some agreements with the defendant *Waller*, on the 2d of *October* 1771, and the 17th of *January* 1772, as stated in the bill; but that the said agreements were only verbal, and not reduced into writing, and were only for one year, and for so much longer as he and they should chuse. The bill then charged, that the defendant *Henry Hutchins* had entered into an agreement with *Waller* on the 23d day of *January* 1772 (subsequent to the date of the said pretended agreement) to take all the tithes of the land then occupied by him from *Michaelmas* 1771 to *Michaelmas* 1772, at the yearly rent of thirty-four pounds nineteen shillings, and had ever since paid that sum to *Waller*; that supposing such prior agreement to have been good, it was waived by such subsequent agreement; that in *July* or *August* 1777, *Hutchins* desired *Waller* to compound with him for his tithes, and requested that he would not collect them in kind; that *Waller* then told him it was his own fault that he had not an agreement before for a term of years, or during his incumbency. The bill then further charged, that the said agreements being during pleasure, had been determined by the aforesaid notice, and prayed that the defendants might account with the plaintiff for the single value of the tithes, which, since the 24th day of *March* 1778, had arisen from the lands in their respective occupations, and pay him what should appear due on such account.

The defendant *Rouse* and several others admitted, that the parish of *Kensington* consisted of a rectory and a vicarage; that the vica-

ridge was endowed, and the vicar thereof entitled to the tithes of corn, grain, hay, small tithes, offerings, oblations, and other vicarial dues, yearly arising in that part of the parish which lies on the south side as aforesaid, particularly to the tithes of wool, lambs, milk, eggs, fruit, herbs, garden-stuff, plants, flowers raised for sale, hemp, flax, and honey; that the defendant *Waller* was in the year 1770 presented thereto, and had ever since been vicar thereof; and that the leases had been made, and the notices given, as stated in the bill, excepting that such notices were delivered to each of them on *Michaelmas-day* 1777, and not before, as they verily believed; and they severally set forth a particular account of the lands and grounds by them occupied within the parish before and since *Michaelmas* 1777, and how and in what manner such lands and grounds had been used and occupied during that time.

The defendants *S. Hutchins*, *B. Williamson*, and *H. Hewitt*, said, that for about fifty years before a composition of six shillings an acre had been paid for the nursery grounds in the parish to the vicar; that *Waller*, about 1771, being desirous of raising the composition to ten shillings an acre, divers meetings were had between him and the occupiers; that on the second day of *October* 1771, at that meeting, the defendant *H. Hewitt* paid *Waller* one year's tithe, at the old rate of six shillings an acre, to *Michaelmas* 1777, and took a receipt for the same; that after some discourse between them, the defendant *Waller* insisted on ten shillings an acre, which they refused; that he proposed to accept nine shillings, and the defendants offered eight shillings and sixpence; that thereupon they tossed up whether it should be eight shillings and sixpence or nine shillings; which being consented to, *Waller* tossed up half-a-guinea, and the defendant *S. Hutchins* called *Head*; that the said half-guinea having settled with the head upwards, the defendant *Williamson* said, "*Deo* *Gratias*, *We have won*;" that it was thereupon agreed, as they understood, between him and them on behalf of the said nurserymen, that the composition for the tithes of all the nursery grounds within the said parish should for the future, during his, *Waller's*, incumbency, be at the rate of eight shillings and sixpence an acre; that the said defendant *Hewitt* informed *Waller*, that some memorandum should be made of the agreement that had been made; that thereupon he assented thereto, and wrote under the said receipt so given by him as follows: "Agreed for eight shillings and sixpence an acre for every year hereafter;" that they then considered, and still consider the said agreement as a permanent agreement between him and the said de-

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sendants on behalf of themselves and all other nurserymen within the parish; and that it was to continue during the incumbency of *Waller*; that the said defendant *Hewitt* was the more confirmed in such opinion, because he having paid his composition for tithes at the rate aforesaid up to *Michaelmas* 1772, the said defendant *Waller* gave him a bill and receipt as follows, viz. "Messrs. *Hewitt* and *Smith* debtors to the reverend *Mr. Waller* on account of tithes due at *Michaelmas* 1772, for twenty-one acres of nursery ground at eight shillings and sixpence an acre, as by agreement, eight pounds eighteen shillings and sixpence. Received this nineteenth day of *December* 1772, the above contents in full by me *James Waller* vicar;" and because *Waller* had continued to receive the said composition up to *Michaelmas* 1777; that for many years before 1772, they had been accustomed to pay a composition for their tithes after the following rates, viz. "six shillings an acre *per annum* for garden ground, and three shillings for arable land;" that upon *Waller* becoming vicar, they waited upon him to know if he would take the aforesaid compositions of them, which he would not consent to, but demanded six shillings an acre both for the garden ground and arable land, which the defendants thought very unreasonable, and resolved not to agree to it, as he was entitled to no more than a moiety of the great tithes, and they had only paid up to that time three shillings an acre to his predecessors, and three shillings an acre to *F. Greening*, the owner of the other moiety; that *Waller* being determined not to abate, and the said farmer gardeners not to accede to his proposal, they parted dissatisfied, when *Waller* said he would take his tithes in kind, which he attempted to do; that finding it would not answer, he soon afterwards agreed with the defendants and the rest of the farmer gardeners that upon paying their six shillings an acre, as well for garden ground as farming produce, crop or not crop, (excepting seven shillings an acre for ten acres in the possession of the defendant *Combes*, which *Waller* insisted was a fruit garden), he would give them all leases during his incumbency; that the defendants, for avoiding all disputes with him, acquiesced therein; that they had ever since paid their tithes according to such agreement: and they submitted, that they were entitled to have such agreement carried into execution, and to have a lease granted to each of them of their said tithes agreeable thereto.

The defendant *J. Rouse* said, that having paid the composition for his tithes on the tenth of *January* 1772, in consequence of such agreement, a receipt was given to him by *Ed. Cooper*, on behalf of *Waller*,

Waller, at the foot of which receipt, in confirmation of the said agreement, *Waller* wrote as follows: "Agreed in future to pay for thirty-one acres two roods, at six shillings an acre, which will amount to nine pounds nine shillings;" that he, the defendant, had accordingly paid him the said nine pounds nine shillings, for his annual composition, every year since up to *Michaelmas* 1777, for the said thirty-one acres two roods, and also after the same rate per acre for all the lands he had since occupied in the parish.

The defendant *J. Rubergall* said, that on the tenth of *January* 1772 he paid *Waller* the composition for his tithes up to *Michaelmas* 1771, at which time he gave him a receipt for the same, and wrote underneath it as follows: "Agreed in future for thirty-five acres at six shillings an acre, which will amount to ten pounds ten shillings."

The defendant *S. Hutchins* said, that on the sixteenth of *December* 1772 he paid *Waller* the composition for his tithes up to *Michaelmas* 1772, at which time he gave him a bill and receipt written and signed by him, viz. "Mr. *Samuel Hutchins* debtor to the reverend Mr. *Waller* on account of tithes due at *Michaelmas* 1772, to sixteen acres one rood nursery ground at eight shillings and sixpence an acre, as by agreement, six pounds eighteen shillings and three halfpence; to ten acres corn land, &c. on the south side of *Kensington* parish, at six shillings an acre, as by agreement, three pounds, nine pounds eighteen shillings and three halfpence. Received this 16th day of *December* 1772 the above contents, *James Waller*;" that pursuant to the said agreement, he had ever since, up to *Michaelmas* 1777, paid eight shillings and sixpence an acre for the nursery grounds, and six shillings an acre for the corn land.

The defendant, *H. Hutchins*, insisted that *Waller*, on the 17th of *January* 1772 entered into, and with his own hand wrote and signed an agreement with him; whereby he agreed to let him, so long as he should continue vicar of the said parish, all the tithes (whether rectorial with which he was endowed or vicarial) of 116 acres, which he then occupied in the parish; at the yearly rent of thirty-four pounds nineteen shillings, with a proviso, that if the then mode of cultivation should be altered, the said agreement should be void; but that so long as the said lands should continue in their then state, and so long as he should continue vicar of the said parish and *Hutchins* the occupier of the said land, the said agreement was to be binding on each party, and preparatory to a lease between them. He said, he had ever since paid *Waller* pursuant thereto the yearly sum

1781. sum of thirty-four pounds nineteen shillings, and insisted on the benefit thereof.

All the said defendants insisted that the plaintiff before the agreement for and execution of the lease to him from *B. Bryan*, had full notice of the said agreements having been entered into between *James Waller* and the defendants; and that he, by having entered into them, and having ratified the same, and received the said several compositions from them up to *Michaelmas 1777*, without objecting thereto, had manifested his sense and understanding thereof, and could not now vary or rescind the same.

The defendant, *H. Hewitt*, and others, insisted that the vicar was not entitled to the tithes of pines, melons, hot-house plants, green-house plants, or of any plants or roots growing or planted in hot-houses, or of any exoticks, or of any plants or trees inoculated or grafted, or of any plants, trees, shrubs, or roots, purchased or planted in their nurseries or garden-grounds, and from thence sold out again without having made any increase in number.

All the defendants insisted, in case *Waller* had any right to determine the composition in the manner he had attempted, which they denied, that the several notices given to determine such compositions and take the tithes in kind, were short and insufficient, considering the nature of the crops to be tithed.

The defendants *J. Rouse* and others, by their further answer, also submitted to the judgement of the court, that the vicar was not entitled to the tithes of pines, melons, hot-house plants, green-house plants, or of any plants or roots growing or planted in hot houses, or of any exoticks within the said parish, or of any plants or trees inoculated or grafted, or of any plants, shrubs, trees, or roots, purchased and planted in their nurseries or garden-grounds, and sold out again without having made any increase in number.

The defendant, *H. Hutchins*, admitted that he had never signed the agreement dated the seventeenth day of *January 1772*, but left the plaintiff to the proof thereof; and he recited the several conversations touching assessing *Waller* to the poor rates for his tithes; and said that he came to some agreement touching the same, as stated in the answer, and insisted on the impossibility of setting out the tithes for the reason aforesaid.

H. Hewitt and others filed their cross bill against *Waller, Bryan*, and *A. Adams*, and thereby particularly insisted on the agreement entered into between the said *J. Waller*, as vicar of the parish, and the plaintiffs and others occupiers of nursery grounds therein, for an annual

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nual composition for the tithes of such nursery grounds, at the rate of eight shillings and sixpence an acre; and also on the agreement entered into between him and them, &c. occupiers of garden grounds not used for nurseries, and lands used in common tillage within the parish, for an annual composition for the tithes of such garden ground and land, at and after the rate of six shillings an acre during the said *Waller's* incumbency; and that he was in equity and conscience bound to perform the said agreements. They insisted, that he having entered into and ratified the said agreements, could not afterwards make any valid conveyance, lease, or demise of such tithes to the said *B. Bryan*, or any other person; and that such lease to the said *Bryan*, and the assignment thereof to *A. Adams*, were void and of no effect against the plaintiffs, having been made by persons who had no right to make the same. They therefore prayed, that *Waller* might be decreed to accept the annual sums of eight shillings and sixpence, and six shillings, as compositions for the said tithes, and perform the several and respective agreements so made and entered into by him with them, and might indemnify them respectively from the several claims of the other defendants on account of their said tithes, the plaintiffs being willing to pay the said defendant *Waller* what was due on account of the said compositions for the said tithes, at the rate of eight shillings and sixpence, and six shillings, an acre respectively; and also to pay the same annually during the incumbency of *Waller*, as a composition for the tithes of the said grounds in their respective occupations; and that the said *B. Bryan* and *A. Adams* might be restrained by the decree of this court from taking their tithes in kind of the said grounds, and from anyways molesting the said plaintiffs on account thereof.

The defendant *Waller* said, that after his induction into the vicarage, he found that the several annual compositions paid by the occupiers of lands and grounds in the parish, for the tithes of such lands and grounds, were considerably under the real values thereof; that he thereupon signified his intention to raise the same; and he stated the meeting of the second of *October* 1771, and the proposals that were then made; but insisted that he did not mean to agree to toss up whether nine shillings or eight shillings and sixpence should be paid for the said composition; but he admitted that he at length consented to receive from the said occupiers after the rate of eight shillings and sixpence an acre, as a composition for the tithe of their said lands; but that he meant only to accept such composition for a year certain, or such longer time as he should

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think proper. He insisted that no agreement in writing was then, or at any other time, entered into between him and the plaintiffs, or any other occupiers of the said nursery grounds, for a composition for their said tithes. He said, that about the twenty-third of *January* 1772 he entered into an agreement in writing with *H. Hutchins*, as before mentioned. He also said, that when the plaintiff *J. Rouse*, in 1772, paid him a sum of money as a composition for his tithes, and took a receipt for the same, he wrote down upon the same what sum he was to pay as a composition for his tithes for the then next year; but he denied that it was at either of the said times, or at any other time or place, consented to or agreed between him and the other defendants, or any of them, on behalf of themselves and the other occupiers, that the aforesaid, or any other annual composition for tithes of all or any such nursery grounds, should continue as long as he should continue vicar, or that any other agreement than such as before mentioned was then, or at any other time, entered into between him and the plaintiffs, or any other of the said occupiers, or that he had ever offered them a lease of their respective tithes. He denied, that he had entered into any agreement with such of the plaintiffs or other persons as occupied garden grounds or other grounds not used for nurseries, or for lands used for common tillage, to accept in future a composition of six shillings an acre; or any other composition for the tithes of such grounds and lands for every year thereafter during his incumbency, or for any other term save as aforesaid, or that he had at any other time entered into any agreement with them. He insisted that it was not understood or considered by the plaintiffs and all persons, that the agreements respectively made as aforesaid were to continue in force, or be binding on them and the defendant during all the time he should so continue vicar of the parish, or for any longer time than one year from the time of the making thereof respectively. He admitted he had yearly, from *Michaelmas* 1771 to *Michaelmas* 1777 inclusive, received the said annual compositions of eight shillings and sixpence, and six shillings, an acre from the plaintiffs, except *A. Shailer*, and from the several owners and occupiers of such nursery grounds, and garden grounds and lands used in common tillage in the said parish. He said, that in *August* 1777 a demand was made upon him for the poor's rate in respect of the said tithes, contrary to the former practice of the parish; that therefore a meeting was held at his house of the parishioners and other occupiers within the parish, when they came to terms, as in his answer was

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was mentioned. He also said, that he entered about this time into an agreement with the defendant, *B. Bryan*, to grant him a lease of the tithes of the lands on the south side of the king's highway, as aforesaid, for six years, if he should so long continue vicar of the parish, at 280 l. per annum; that in pursuance thereof, about the 9th of *September* 1777, he caused the said plaintiffs and other occupiers of nursery grounds, garden grounds, and other lands within the said parish, to be severally served with notices to the purport or effect as in the bill mentioned; and that on the 27th day of *September* 1777 he executed a lease to the said *B. Bryan*.

The defendants *B. Bryan* and *A. Adams* spoke to the same effect.

The defendant *B. Bryan* insisted on the agreement entered into before the 8th day of *September* 1777 between *Waller* and him for a lease of the tithes arising in that part of the parish as before-mentioned, and of the lease executed to him by *Waller* of such tithes on the 27th day of the said *September*; and said, that in pursuance of the said agreement, he had, some time between the 20th and 27th days of *September*, caused to be delivered notices to the plaintiffs and other occupiers of land in the parish, dated the 10th of the said month, that he should take the tithes in kind of the lands they held in the said parish from *Michaelmas* then next. He insisted, that the other defendant *Adams*, soon after the execution of the said lease, having agreed with him for an assignment thereof, and to pay him the yearly sum of sixty-three pounds, he, by indenture dated the 24th of *March* 1778, assigned to him all those the tithes and premises demised to him by the said lease from the defendant *Waller*, and all his estate and interest therein for the remainder of the said term.

The defendant *A. Adams* insisted on the said agreement entered into between him and the defendant *Bryan* for an assignment of the lease executed by *Waller*, and of the indenture of assignment thereof executed to him by *B. Bryan*; that in pursuance of the said agreement, he caused to be delivered, on the twenty-seventh of *September* 1777, to each of the plaintiffs and others parishioners of the parish, a notice dated on the twenty-seventh day of *September*, purporting that he had taken their tithes, and that they were not now to move any of their crops after *Michaelmas-day* then next, without giving notice to him, that the same might be properly tithed: and he insisted on his right to tithes in kind of the several tithable matters arising on the lands occupied by the said plaintiffs

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as aforesaid; and hoped that he should not be restrained from taking proper measures for the recovery thereof.

Maedonald, Kenyon, and Schwyn, of counsel for the occupiers, objected, that the notice to determine the composition was insufficient, it being given less than a month before *Michaelmas-day*, at which time the composition was payable. They insisted that the agreement was intended to be permanent. The agreement with the predecessor subsisted during the whole incumbency. It was natural therefore that they should wish for and intend a renewal of such permanent agreement. The words, "agreed for 8s. 6d. per acre, for every year *hereafter*," must mean during incumbency. The others, "as *per* agreement" or the like, shew that there was some general agreement. They argued farther, that the subject itself, *viz.* peach trees and the like, is not tithable. 1 *Ro. Abr.* 637. *pl.* 6. is full of bad law. The parson has the tenth peach, &c. is he also to have the root? This is not like to *filva cadua*, which is renewable annually. But the produce of a hot-house is not the produce of the earth. If tithe be payable of this, then it must be also of pots in a house, sallad raised on a flannel, &c. Is it convenient that this should be tithable? if it be, the expence of raising it is so enormous, that the tithe would amount to a prohibitory tax. The claim is unsupported by any case or *dictum*. If this be allowed, by the same rule polished steel and other manufactured produce of the earth would be tithable.

Mansfield for the vicar.—There is no binding agreement in this case. The court would require something extremely strong indeed to bind the vicar for ever, where he has not a scrap of paper to bind the other parties. The general nature of these transactions is, to be binding only as long as both parties shall please. And then if the memorandum added to *Hewitt's* receipts amounts to an agreement, it can bind no farther than that. The others are unconnected with *Hewitt*, and their payments being of a similar nature, proves nothing: this as to the nursery-men. As to the gardeners, the notice to determine the agreement is good. The case of *Glasse v. Caldwell* shews it to be so. For this is very different from the case of a farm. There is no new stock to provide; nothing new to do; nothing besides severing the tenth instead of taking all away. As to the hot-houses—Here the Chief Baron interrupted him, saying, there was no evidence as to these; therefore that the regular way would be to direct an account (if any proper), in which case the Deputy Remembrancer would make his report special, if he had
any

any doubts, and therf the court would have the circumstances stated in his report as evidence to decide upon, and that report might be excepted to.

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But *Mansfield* was desired to go on. —These articles are the produce of the earth, though mixt and meliorated for the purpose. Are cucumbers objected to? No. What then can be said as to melons? every thing raised in a garden is principally in consequence of manure and labour; and yet it is tithable. As to exoticks, no objection can be made to them; for hops, madder, saffron, tobacco, were originally exoticks. He cited *Breamer v. Thornton*, *Hardr.* 203. to shew that a composition by parol was not binding on the parson.

Scott v. S. S. —Here are two classes of defendants, and they ought to be distinguished. I own the expression “for every year hereafter” to be very strong; but the circumstances explain it. There are only three receipts in so many years which have it; there is no agreement in writing, nor any other written testimony. The court would rather explain these three receipts by all the rest, than all the rest by these three. Either the other gardeners are not to be prejudiced by *Hutchin’s* acts, or they must consent not to be benefited by them, viz. by his receipts.

The argument that hot-house plants, &c are exoticks, and therefore not tithable, proves too much, for all but crabs were originally exoticks. Cherries were brought into *Europe* by *Lucullus*. Vines were introduced here later than in *France*; and there they were not indigenous. Walnut signifies a foreign nut (e). *Wall* and *Wales* were so called by the *Saxons* for the same reason (f). Cabbages were brought from *Holland* in the time of *Charles 2.* when a cabbage cost at least a guinea. Guineas and cabbages coming here together (g), the terms were convertible. Potatoes were introduced

(e) Val-hnvtu, Walnut. *Potius autem Valh-hnvtu, sc. Wallicæ sive peregrinæ nuces.* Lye’s *Saxon Dict.*

(f) Valh, i. q. Vealh, *peregrinus, alienigena, barbarus.* *Britanni a Saxonibus fugati, quasi sibi extranei, Vealhar, Vealar, Veallar, appellati sunt.* Lye’s *Saxon Dict.*

(g) I suspect the accuracy of the report in this part. Guineas were first coined in *England* in 1673; but that cabbages were then first introduced should seem to be a mistake. *Anderson* in his *History of Commerce* states them to have been brought thither from *Flanders* about the year 1524. That they were well known in *England* before the time of *Charles the Second*, *Shakespeare* will tell us:

Eva. Pauca verba, Sir John; good words.

Fal. Good words! good cabbage.

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Merry Wives of Windsor.

Perhaps,

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duced by sir *Walter Raleigh* into *Ireland*, whence they were brought here. There is some account of them in a note in *Johnson* and *Stephen's* edition of *Shakespeare* (*h*). In the north all the common fruit

Perhaps, the plant is indigenous in this country, as it still is found wild in many parts of this kingdom, particularly about *Dover*. The varieties of it, and the present improved state to which the different sorts are brought, are the mere effect of culture. As our neighbours on the continent long preceded us in horticultural improvements, it is probable that the plant, as raised and meliorated by art, was imported from them, and thence the notion that it was an exotic.

(*h*) The note here alluded to is upon the passage in *Troilus and Cressida* of "Luxury with his *potatoes* finger." Act iv. Sc. 2. It is a very long note, too long to be inserted in the usual place, immediately under the text, and is therefore subjoined at the end of the play. The part to which Mr. *Scott* alludes, and which is wholly borrowed from *Campbell's Political Survey*, is as follows :

"It appears from Dr. *Campbell's Political Survey of Great Britain*, that potatoes were brought into *Ireland* about the year 1610, and that they came first from *Ireland* into *Lancashire*. It was, however, forty years before they were much cultivated about *London*. At this time they were distinguished from the *Spanish* by the name of *Virginia potatoes* or *battatus*, which is the *Indian* denomination of the *Spanish* sort. The *Indians* in *Virginia* called them *openank*. Sir *Walter Raleigh* was the first who planted them in *Ireland*. [*Campb. Pol. Sur.* vol. i. p. 95. notes.] Authors differ as to the nature of this vegetable, as well as in respect of the country from whence it originally came. *Switzer* calls it *Sisyrinchium Peruvianum*, i. e. the *flax* of *Peru*. Dr. *Hill* says, it is a *solanum*, and another very respectable naturalist conceives it to be a native of *Mexico*." [Vol. ii. 246. notes.]

If the reverend commentator had not been too deeply intent upon illustrating a favorite allusion to regard the ascertaining of an historical fact, it must have occurred to him either that Dr. *Campbell* had fixed the date of the introduction of the potatoe into this country too late, or that the potatoe which the Dr. was speaking of was not the same plant with that which *Shakespeare* and the writers quoted in the note were alluding to: for Dr. *Campbell* fixes its introduction into *Ireland*, whence it was some time afterwards brought into this country, so late as the year 1610; but the play of *Troilus and Cressida* was written and printed before that year, and several of the other books mentioned in the note were of still earlier date, such as the translation of the *Menæchmi* of *Plautus* in 1595, *Greene's Disputation between a Hee Conycatcher and a Shee Conycatcher* in 1597, &c. In truth, the potatoe to which these old authors ascribed provocative qualities, and the modern potatoe, had nothing of identity in them but the name: they were two quite distinct and different plants. The former was a kind of *convolvulus* or *bind-weed*, and was the *Spanish battatus*, of which the *English* name *potatoe* is evidently a corruption. This plant was well known and in common use in *Gerard's* time, who tells us that it grew in *India*, *Barbary*, *Spain*, and other hot regions, and was to the inhabitants of those countries, as well as of *Italy*, an ordinary food; but that he could not succeed in getting it to flower in this country, so that he was unable to give a description of its blossom. The modern potatoe is a *Solanum*, the *Solanum tuberosum* of *Linnaeus*, and is a native of *Peru*. The *Indians* called it *openank* or *pappus*, which latter word signifies "the roots," and was the common name of these esculent plants. It had the name of

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fruit is raised by art and at great expence. As to the expence, if that be an objection, it would have excluded cabbages, and most other things; and hereafter the raising of pines may cease to be expensive. In *Gibbs v. Wyborne*, Sir W. Jen. 416. it was settled, that trees drawn out of nurseries and sold were tithable. As to the notice, this is not similar to the cases that have been mentioned.

A person claiming a right to retain tithes, is not similar to a tenant of land. There is no case where it is holden that a parol agreement to retain tithes during incumbency is good. Nor can any good reason be given why an earlier notice should be given than immediately previous to the beginning of the composition. See what is said by Holt C. J. in 2 Salk. 414. In *Hume v. Wright* in this court M. 16 G. 3. where the party insisted on a modus, it was holden that no notice was necessary, because he set up an adverse title. I would rest upon the same reason: for I cannot see that that defence by alleging a modus is more inconsistent with insisting on notice, than a permanent composition is, or more to be considered as an adverse title.

Mr. Macdonald in reply. In new matters the legislature does not quite keep pace with the improvement of the times. Here, in a case new, the decision of the court must make the law.

As to the power of demising tithes by parol, let us examine the cases. Before the statute of frauds, we have the case of *Gomersul v. Bishop*, Cro. Eliz. 136. in prohibition, where the power to demise seems to have been admitted, though the case was decided upon a fault in the declaration. In *Nelson v. Woodward*, Cro. Eliz. 188. 249. it was holden; that a grant of tithes without deed for life was not good, though for years it might be. In

potatoe given it in this country from its supposed resemblance in form and taste to the Spanish battata, and was distinguished from it by the addition of the American or Virginian potatoe. Linneus informs us, that this plant was introduced into Sweden in 1590, and it was certainly known in this country before the time which Dr. Campbell assigns for its first importation into Ireland: for Gerard gives us in his *Herbal*, which was published in 1597, a very accurate plate of it in a very flourishing state, and says, that he had the plants then growing in his garden where they were thrifty and vigorous and succeeded well. It is evident from hence, that Switzer and Dr. Hill are speaking of two different plants, the one, meaning the Spanish potatoe, the *Sisyrinchium Peruvianum*, which is the name which Gerard likewise gives to that sort of potatoe; the other, meaning the modern potatoe or *Solanum*, which, as we have above stated, received the trivial name of the former from a fancied resemblance to it.

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Hawles v. Bayfield, *Hob.* 176. it was holden that an agreement for tithes during incumbency without deed was not good. In *Honeycomb v. Swete*, *Cro. Jac.* 668. it was ruled, that a parol agreement to retain tithes for years was good. And upon the authority of this case, it was determined in *Pentwood v. Evans*, 1 *Lev.* 24. that a parol contract to retain was good. In *Breamer v. Thornton*, *Hardr.* 204. there was a different determination in this court, viz. that a parol agreement to retain was not good for more than a year. But in the present case there is more than a parol agreement. It is not indeed an agreement in strict form, yet it is sufficiently reduced to writing; and there is no difference between tithes and other property, as far as concerns the nature of the writing which is the evidence of a binding agreement. As to the notice, the case of *Breamer v. Thornton* only shews when the notice is too late, and nothing more. This and the other case both allude to the cultivation on the faith of the agreement. The present rule respecting farm modules is a modern introduction, founded upon reason and convenience. The notice in the case of tithes was formerly grounded on the rule as to notice upon a mere tenancy at will. Why should we not make it analogous to the modern improvement of notices on tenancy for years? The dissent of *Mr. Baron Perrot* in the case of *Glaspe v. Caldwell*, the opinion given by *Mr. Wilbraham*, and the constant practice, are all very material circumstances.

As to the subject of the tithe in this case, our objection is, not that things not indigenous are not tithable; but that things not the produce of the soil and climate are not tithable. I wish that *Mr. Scott* had pushed his argument a little farther, and supposed the cold hand of the vicar to have been thrust into the hot-house: would the plants have been so far nourished, as to become matters of common use? There is a great difference between the plant in the hot-house in an artificial state, and afterwards when naturalized to soil and climate. It is quite new to demand tithes of things of this sort; it would suffocate such improvements, and be the most impolitick thing in the world; besides, they are not in their present state matters of profit. As to ingrafted trees, many of them fail: of what then are the tithes to be taken? of all, or which—of fruit and trees, or not?

Lord C. B.—This cause has undergone great examination and discussion; though the facts are plain and clear. The original bill is brought by *Adams*, assignee of a lease under the vicar of *Kensington*.

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ton, for the tithes of nurseries and gardens. The vicar's title by endowment is clear ; but the defendants say he is not entitled to demand tithes in kind, because of a binding agreement for a composition to continue during incumbency ; and they file a cross-bill to establish this defence by compelling a demise accordingly, with a little variation between the case of the nursery-men and that of the gardeners. As to the nursery-men the evidence arises from four receipts. First of 1771 has added to it "agreed for 8 s. 6 d. *per* acre for every year hereafter." Second of 1772 for "as by agreement." Third given to another person in 1772, "as by agreement." Fourth to another in 1773, "as by agreement." Fifth at a less sum, "in future as for other nursery grounds." And it is insisted, that this is an agreement on behalf of all. It is necessary that an agreement to be executed by a court of equity should be plain and clear ; and this is a great ground of the statute of frauds. Now it is said, "every year hereafter" must mean during the continuance hereafter. But the intent must be taken, among other things, from the subject matter of the agreement. Here the subject was continually changing. This does not appear then certainly and conclusively to be a permanent agreement during the whole incumbency. If this does not, the rest are still less so.

As to the gardeners, there is more evidence for them, if not contradicted. There are two receipts, both in 1772 ; the one "agreed in future to pay for thirty-one acres and two roods :—" the other, "agreed in future at 36 s. *per* acre for acres." These are explained by an instrument dated seven days after, signed by Dr. *Waller*, agreeing to take a certain sum, "provided, if present cultivation altered, void—if continued, binding and preparatory to a lease." Undoubtedly, this, being made by *Hutchins* for the rest, is a binding agreement for a lease. What answer is given to this ? Why, that it was never accepted by *Hutchins*, but rejected by him, saying he would agree only for a year. This agreement thereupon was carried back, and a new one prepared for one year only, which was signed by both the parties. As to the two receipts, notwithstanding the memorandum at the bottom, yet it is in proof that at their next payment they both declared they would not continue to pay so much, and that he should take his tithe in kind. The agreement therefore was not binding in the consideration of the parties themselves. On the delivery of the notice to *Hutchins*, he only said, he was sorry they were disturbed, but expressed nothing about a binding agreement. I am satisfied therefore, that, as to the nursery-men, there is not sufficient evidence of an agreement ; and as to the

1781. gardeners, it is falsified. As to the nursery-men, if there had been more evidence, there would have been a doubt on what ground their claim could have been founded. As to the gardeners, indeed, it is expressly said, "for a lease," and therefore plain. But as to the nursery-men, how or why is an agreement not binding in law to be executed in a court of equity? a lease does not even appear to have been in contemplation, which would have made a great difference.

Are then the compositions actually determined by the notice which has been given? There was much uncertainty in this learning till the case of *Glassé v. Caldwell*. But it is unnecessary to discuss that case now; for it comes within the case of *Hume v. Wright*; for the defence is an adverse title, and there is no difference between insisting upon a modus and a binding composition. The present case indeed is stronger, because it is accompanied with a cross bill.

It remains then to see, whether the matters in question are titheable. As to melons, pines, &c. I know not how to draw any line between them and other produce of gardens. What is the tithe of gardens? It is predial. The notion of artificial heat and soil would exclude almost all the produce of gardens; things raised under glasses are raised in an artificial soil. But they must all be subject to the same rule. Inoculation to be sure is a work of art; but art and expence used will not make any difference.

Eyre B.—The case on the part of the lessees is plain. The question then is, whether the defence is sufficient? 1st, Is the composition binding? As to the nursery-men it is too uncertain. As to the gardeners, it is exposed to the same objection; or, if it be taken on the act of *Hutchins*, then it is contradicted. To found a decree of the court for a specific execution of an agreement, it is necessary that the agreement should be made out to be clear and certain. In this case it is not so: it is ambiguous and loose; it may mean "so long as both parties please." I conjecture that *Dr. Waller* did intend to agree for his incumbency; but, if he did so intend, that does not prove that he did actually agree, and that all the other parties did so; and there is no proof of any such agreement on the part of the nursery-men and gardeners. It is clear then, that the cross-bill must be dismissed as totally groundless, and I think it should be so with costs. Indeed, if the fact had been other than it is, I am doubtful how the law would have been; for though the agreement would have been good as to time past, yet I am not satisfied that a court of Equity can give validity to an agreement

agreement by parol, where the subject would have only passed by deed. Here then, these compositions though subsisting during incumbency, yet are only annual, being by parol. But this only *obiter*; I mean not to decide. 1781.

As to the second point in the original bill, the insufficiency of the notice; I agree that *Hume v. Wright* is decisive that no notice is necessary. There, the defence set up was an adverse title, viz. a modus. This is a disclaimer of that relation out of which a notice becomes necessary, by analogy to the case of notice as to tenants in ejectment. But it is said, that the modus was perpetual, and that the composition in this case is not so. But it is so as to the vicar; and there is no difference in reason. Nor are there any difficulties attending this decision; for these agreements do not much resemble demises of houses or lands. They are merely another mode of taking the thing. Nor does it occur how it can much affect the raising of the produce, if the value be fair. But occasional inconveniencies are no ground for general rules of law. I think the decision in *Glassé v. Caldwell* the better opinion. It is best to adhere to the old rule where a new one cannot be made without great difficulties. But this I throw out only *obiter*.

As to the last objection, hot-house plants, &c. are certainly not exempt. The like hardships occurred in wastes, madder, &c.; but an act of parliament was necessary to exclude the right of the parson. The general rule is clear; and the inconveniencies attending it are not so great; and mutual inconveniencies will suggest mutual moderation. If not, a court of justice cannot help it.

Hotham B. of the same opinion.

The court therefore ordered that it should be referred to the Deputy Remembrancer, to take an account of what was due to the plaintiff from the defendants for all the tithes in kind demanded by him, and the usual directions were given for taking the account, and that all the defendants in the original cause should pay to the plaintiff his costs of the suit to that time to be taxed; and the court further ordered, that the cross-bill should be dismissed with costs, to be taxed for the several defendants in the cause.

From this decree there was an appeal by *Hewitt* and six others to the House of Lords, upon the following grounds:

1. It having been admitted, that the appellants had, under some agreement, paid Dr. *Waller* compositions in lieu of their tithes for every year from *Michaelmas 1771* to *Michaelmas 1777* inclusive,

1781. therefore, although Dr. *Waller* might have a right to determine the compositions, yet he could not do it without a reasonable notice to the parties; and the appellants contend, that the notices which are mentioned in the pleadings to have been given for determining such composition, and for taking the tithes in kind, unless a new agreement was made with the doctor's real or nominal lessee, were unreasonably too short, and therefore insufficient for that purpose. The notices given by the doctor and his assignee were three in number; the first was given on *September* 12th, the second between the 20th and 27th, and the third upon the 29th of the same month; all these notices affect to put an end to the composition from the *Michaelmas-day* then next. The interval between the earliest notice, and the day on which it was to take place, is not three weeks. It is established, that a tenancy from year to year, in the case of farms, cannot be determined by the landlord without six months notice prior to the end of the tenant's year; and it is conceived that tithes have repeatedly been holden to stand in this respect upon the same footing with corporeal property. It seems reasonable that either party intending to put an end to such a composition, and to pay or require payment of tithes in kind, ought to give a longer notice of that intention, particularly so where the notice is given to the tenant that he may be the better enabled to adapt the mode of his cultivation to the nature of his tenure. It cannot be disputed, but that in the exercise of that discretion, which every man has a right to exercise, and every prudent man will exercise, as to the mode of agriculture most likely to be beneficial to him, it is of importance to him to know, whether he is to set out his tithes in kind, or to pay a pecuniary composition in lieu of them; and to conceal an intention to put an end to such a composition (continued uninterruptedly for six years, under a supposed agreement) and thereby delude a man into a belief that it is to continue, appears to be unreasonable and unfair conduct on the part of the lessor, of which, it is presumed, a court of Equity ought not to admit him to avail himself. It is a fact, that every landlord thinks himself obliged to give a much longer warning to his nurseryman tenant when he means to determine his holding than he does to the common farmer: the usage has certainly been to give the nurserymen three years notice. If the notice were insufficient, the account ought not to have been directed; Dr. *Waller* and his lessee would then be entitled

titled to the composition only during the litigation, and, consequently, the respondent's bill would have been dismissed.

2. The decree directs an account of hot-house and green-house plants. It is conceived that these are not tithable in point of law. If they can be ascribed to any class of tithes, it must be to that of predial tithes, the definition of which is, that they arise merely and immediately out of the ground. The plants in question, it is well known, are not the produce of the soil of this country; a climate and compost must be procured to keep them in a state of vegetation; they do not grow in the earth, nor derive their sustenance from thence; some of them cannot by any art be propagated in this country: and as to pine apples, one of the principal exoticks that can ever produce profit to the parson by their successful increase, it is conceived, they cannot be deemed tithable, when it is considered, that the skill and labour of several years is absolutely necessary to be bestowed upon them, in order to bring them to maturity, independent of the very great expence of hot-houses of the different classes, tan, fire, &c. that they are nurtured in pots from the first moment of their existence to the final period of it; are removed from one successive house to another, as they make their slow approaches to edible perfection, which is only attainable by the skilful management of artificial heat; that they never communicate with the natural earth, and very often in their last stage to maturity are mere residents for a few months only in that parish where they are cut; that they are actually a commercial merchandize, are daily bought and sold in their various stages to perfection, and a great part of them actually propagated in one parish, nurtured in the succession houses of a second, and very frequently pushed into fruit, ripened, and cut in a third or fourth parish. Every argument respecting pine apples may, with equal propriety, be applied to orange trees, with this additional circumstance, that the orange tree, in the first instance, costs the importer nearly half as much as he sells it for when arrived to perfection, after many years expensive cultivation, exclusive of thirty *per cent.* duty paid on the importation. These facts are well known—uncontrovertible; and it is scarcely necessary to say, that if the payment of tithes for exotick plants in general (great numbers of which are annually imported into this kingdom at a very heavy expence, besides freight and duty) including pine apples, orange trees, &c. is to be added to the expence of cultivation, there must be an end to that species of horticulture.—The appellants

1781. further presume, that such trees and hot-house plants as actually grow in the soil, but would not there grow without artificial heat, are not the proper subject-matter of tithing. And with respect to all other species of nursery trees, which are bought in one parish, remain but a little time in a second, and are purchased by a customer living in a third, and frequently undergo a greater number of removals before they are ultimately planted for use; it is humbly conceived, that the respondent is not well founded in contending, that they are subject to pay a full tenth of their whole value upon each removal from one parish to another.

3. It may possibly be said (for it has been relied on) that there was no evidence of the cultivation of these plants. If that be so, yet surely there was enough to have induced the court to have directed the proper officer to have inquired into and to have stated the nature of the culture, with the uncommonly heavy expence necessarily attending it, before they had proceeded to decree the payment of tithes. The bill (*inter alia*) demanded the tithes of pines, melons, grapes, hot-house plants, &c. the appellants resisted the demand, and insisted they were not tithable; the decree has nevertheless directed an account generally, and payment of all the species of tithe demanded. Supposing the court could not take judicial notice of that which all mankind knows (which is a position not to be admitted, and untrue in many instances) yet surely private knowledge of a notorious usage might have dictated an inquiry, which would have given judicial knowledge.

4. Because the decree, by directing an account generally, hath declared the respondent to be entitled to every tenth exotick plant, and to every tenth pine apple and orange tree, without the least regard to the original expence of purchase, which sometimes comes to a third, and often to half the expence for which, when ripened or brought to perfection, they are sold at the market, independent of the very large expence of hot-houses, an expence totally unknown in the cultivation of any of the predial tithes of this country; therefore it is humbly submitted, that the decree ought at least to have directed the officer in taking the account, to have made fair allowances for the very heavy expences peculiarly attending the cultivation of exoticks, and not to have decreed an account generally, which, if so taken, must do apparent injustice to the appellants; wherefore the decree ought also, it is humbly contended, to be reversed or varied.

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The Case of the Respondent.

IN the decree pronounced by the court of Exchequer in the original cause, all the parties have acquiesced, except the appellants, who seem to admit (what is most clearly proved in the cause by their own acts and declarations) that no agreement was made between any of them and Dr. *Waller*, which was or was not intended to be permanent during his incumbency, although they had severally by their answers claimed the benefit of such an agreement, and have thought proper to appeal to the House, alleging in their petition of appeal, that they conceive themselves aggrieved by the decretal order of the court of Exchequer, inasmuch as it having been admitted, that the appellants had, by virtue of some agreement, paid to the said *James Waller* compositions for and in lieu of their respective tithes from *Michaelmas* 1771 to *Michaelmas* 1777 inclusive; that the said several notices in the pleadings in the cause mentioned to have been given for determining such compositions, and for taking the tithes in kind, were short and insufficient notices for that purpose; and that therefore the respondent's bill ought to have been dismissed, as against the appellants; but that, supposing such notices were good and sufficient, yet that such part of the said decree is erroneous, as directs an account to be taken of what is due to the respondent from the appellants for tithes of pines, melons, and hot-house plants, green-house plants, exotick plants, shrubs, trees, or roots, purchased by them, and sold again without having made an increase in number, inasmuch as the appellants apprehend, that several of the said matters and things are not in their nature tithable, and that others of them are not tithable in kind; and that therefore the appellants conceive that the said decree is erroneous.

But the respondent humbly insists that the said decree is just and right for the following (amongst other) reasons:

1. Because the principles upon which notice is required by law, in order to determine demises of lands or houses, or even of tithes, do not apply to cases of compositions paid for tithes, the payment of such compositions being only, it is apprehended, in consideration of law, a mode of rendering the tithes. The true ground upon which the law requires notice to determine such demises is the presumed intention of the parties, the law inferring from the obvious convenience of notice to the parties, that both intended, that if
either

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either should be desirous to determine the relation subsisting between them, he should give the other a reasonable notice of his purpose: but the law, considering compositions for tithes as being in all cases equal in value to the tithes compounded for, or rather as tithes rendered in value, though not in specie, deems it equally convenient to the party who is to account for the tithes to pay them in specie, as to render them in value, and cannot, therefore, consistently with its own principles, infer that the parties to such a contract (to render tithes in value and not in specie) intended that notice should be necessary to determine it, unless the parties express that intention in a written agreement.

2. Because the want of notice to determine compositions for tithes is not, in fact, attended with inconveniencies, which the law, by requiring it, meant to prevent in the case of landlords and tenants.

3. Because, though it has been urged that such notice is reasonably required, inasmuch as if the party who is to account for the tithes had received it, he might have changed the mode of cultivating the land which yields the tithes; it is submitted, as an answer to such an argument, that notice admitted to be reasonable, would scarcely, in any case, be received for so long time before the determination of the composition, as to enable the party receiving it to change the mode of husbandry or culture, or the nature of the produce, if he had the power of changing it, which in most cases he has not; in the present case, where the produce of nursery grounds is raised in succession, year after year, notice admitted to be reasonable would not enable the nursery gardener to change the mode of cultivating the ground.

4. Because, though notice has been formerly stated to be reasonable, that the party receiving it may, if he shall think fit, suffer his lands to be wholly uncultivated, it is presumed that such an argument will not, in modern times, be offered to a court of justice.

5. Because it hath been settled by many decisions in former cases, that notice given one week, or at any time before the end of the year, for which the composition was made, is notice fully sufficient in law.

6. Because, in fact, the appellants had sufficient notice, from what passed at some or one of the meetings holden previous to the time when the first written notice was given to them, as well as from the written notice or notices in fact given of the incumbent's intention to determine these compositions.

7. Because,

7. Because, if the notices given were not sufficient, yet the appellants having severally insisted, that these compositions could not be determined, but with the incumbency of the vicar, have thereby disclaimed the only relation to the incumbent or his lessees, which could possibly entitle them to receive or require notice from either. By this adverse claim they have declared that notice is not necessary. Notice is not necessary to determine a tenancy at will, where the tenant sets up a title adverse to that of his landlord. If any of these temporary compositions had been pleaded as a modus, it is apprehended, upon the authority of an adjudged case, that the party pleading it as such could not avail himself of the want of notice to determine it; and a plea of a permanent agreement, during incumbency, is as inconsistent with the relation which makes notice necessary, as a plea of a modus is. The appellants do not (and against the real truth so fully established by the evidence in these causes, they could not) consider themselves as aggrieved by so much of this decree as proceeds upon the fact, that these compositions were only temporary.

8. Because it is apprehended that pines, melons, hot-house plants, green-house plants, and exotick plants, shrubs, trees, or roots, purchased and sold again, without having made an increase in number, or which are raised in common gardens, or elsewhere, for sale in the market, are tithable in their nature, and tithable in kind.

9. Because it may be shewn, that the arguments which are drawn from the expence, difficulty, and artificial mode of raising these productions, and from the nature of the soil, climate, and places, in which they are produced, and are urged to prove that they are not tithable matters, or not tithable in kind, would equally serve to prove various other vegetable productions not tithable or not tithable in kind, which have always been admitted to be so; and would tend to prove, that the same productions might be reasonably deemed tithable in some parts of the kingdom, which could not be so considered in other parts of it, which would perhaps, in a great measure, serve to prove (if not much qualified) that most vegetable productions are not tithable matters.

10. Because, if exoticks, as such, are not tithable matters in this country (the vegetable productions of which are believed not to be indigenous, except in some few instances), the land would scarcely yield any tithable matter.

11. Because,

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11. Because, if it is inconvenient that productions of this sort, raised for sale in the market, should be deemed tithable, or titbable in kind (which inconveniencies in the present case the conduct of the appellants has occasioned, the incumbent having been always willing to accept a reasonable composition an acre) such inconveniencies can be remedied only by an act of the legislature, and cannot be removed by those who in their judicial characters and capacities are only to declare what the law now is.

12. Because it has been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries, and sold out again, without having made an increase, are titbable in kind; and it is reasonable that they should be so considered.

After hearing counsel upon the following preliminary point, "Whether the notice given was a sufficient notice to determine a composition for tithes;" Lord *Mansfield*, addressed the House in the following manner—

A notice given on the 8th of September is not sufficient to determine a composition for tithes from year to year, the composition commencing on the 29th of September.

My Lords! In this case there was a composition from year to year, and that composition had continued for four, five, six, or seven years. The vicar gave the appellants notice upon the 8th September, to determine that composition, as from the *Michaelmas-day* following, for the ensuing year, and he brings his bill for tithes in kind for that year.

The first objection is, that he has not determined the agreement, because he has not given a reasonable notice; and if that objection is sufficient, there is an end of the cause: the bill must be dismissed: the decree must be reversed. The arguments to over-rule the objection are, "that no notice was necessary;" or, if it was, "that the parishioners had done something in this case that precludes them from making that objection;" for they have insisted upon the construction of the agreement (in general words, it is to accept a composition from year to year, without limiting any time). They have said, the true construction of that agreement is "*during his incumbency*." There arises another objection. "If you prevail, and it is not *during the incumbency*, you have not given sufficient notice;" then the objection is a question of law, whether reasonable notice has been given or not. And the counsel have been confined to that question; and they have not yet gotten to the merits of that point, which the noble Lord has argued in some measure; they have not yet argued that. I am sorry your Lordships cannot determine that point: I wish you could; but the objection to the payment of tithes

tithes out of all these particulars, arises from the mode of cultivation. And it so happens, that on neither side have they gone into any proof of the cultivation; and at the bar they would not agree upon that point, if your Lordships would have taken any agreement from them. So it was impossible to go into that question. Perhaps, in this particular case, the incumbent may not bring another bill; perhaps, others may not bring another bill; but in this state of it I will not say one word against the arguments the noble Lord has used; nor will I insinuate that I think the decree right upon that point. I think there are many objections; they all arise out of the mode of cultivation; but the preliminary point is, whether the notice is sufficient? I will propose the following question to be put to the judges:

“Whether a notice given upon the 8th of *September* be a sufficient notice to determine a composition for tithes from year to year, such year commencing upon the 29th of *September*?”

The question was put to the judges.

Mr. Justice Gould.—The question is, “Whether a notice given upon the 8th *September* is sufficient to determine a composition for tithes from year to year, such year commencing on the 29th of *September*?”

My Lords!

I have conferred with all the rest of my brethren that are here, and they all concur in one and the same opinion which I have the honour to deliver to your Lordships, “That such a notice is by no means sufficient to determine such a contract.”—Decree reversed.

P. 21 Geo. III. A. D. 1781. B. R.

Franklin v. Holmes Clerk. [MS.]

THIS was an action tried before Mr. J. *Heath* at the last assizes for *Oxford*, and on motion for a new trial the report stated, that the pleadings contained three issues. The first issue was to try whether one *John Pearce* and all his ancestors, whose heir he then was, from time immemorial had been used to pay to the king and his royal predecessors the tenths of the rectory of *Wurpsgrave*, and that in consideration thereof the said *John Pearce* and all his ancestors, &c. had received and taken to his and their own use all and singular the tithes both great and small arising within the said parish of *Wurpsgrave*.

Upon an issue directed by a court of law to try the existence of a right, the judge may indorse a different right from that alleged on the pleadings, if the jury find it, without a special order for that purpose.

The

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Qu. Whether a grant before the disabling statute may be presumed to prove a real composition.

The second issue was to try, whether by some ancient real composition the owners or occupiers of lands within the said parish had from the making of such real composition paid the owners of the said tithes the sum of 20 l. in lieu and compensation thereof.

The third issue was to try, whether an ancient modus or prescription of 20 l. was in like manner paid and payable for the said tithes.

At the outset of the cause the judge started an objection, that the first count being for the payment of tithes in kind, was inconsistent with the two other counts, and that the counsel for the plaintiff should make his election on which he would proceed. But, after this point had been argued, on consideration, he was convinced that the objection was not well founded, and therefore waved it. And though he was of opinion at the time of the trial, that *John Pearce* being a layman could not make title to the tithe in question either by prescription or modus according to the doctrine laid down in *Slade v. Drake*, *Hob.* 297. yet, as these objections appeared on the record, he permitted the counsel for the plaintiff to bring proof in support of all the issues. The counsel entirely abandoned the third issue, and acknowledged he could not support the first issue, unless the judge would indorse on the *posse* another right (which in his apprehension differed materially from the prescription laid in the declaration) if the jury should find it. But, as there was no order for that purpose, the judge refused; under the circumstances of the case, to comply with the request. The counsel then opened his evidence in support of the real composition, which he offered to maintain by the testimony of witnesses in such manner as prescriptive rights are usually proved. After he had finished his opening, the judge asked him whether he had any evidence, other than the proof of payment by the testimony of living witnesses, whence a presumption might arise, or an inference be drawn, that the composition in question existed before the restraining statute of 13 *Eliz.* and on his answering in the negative, the plaintiff was nonsuited.

Howarth, Morris, and Bearcroft, of counsel for the defendant, contended, that the first issue was bad upon the face of it, and that it was impossible to support it: that there could not be such a prescriptive title as was there assumed, because the tenths were not given to the crown till long since time of memory, till the statute of *H. 8.* They insisted further, that there could not be a legal commencement of a contract to pay a part, as the tenths were, in lieu of the whole: that a rector too cannot be personally discharged

from the tenths. *Morris* cited the case of *Smith v. Goddard* in the Exchequer (*supra*); in which, he said, he first put in an answer insisting on a modus: that he afterwards stated it as a composition real; but that the court would not let him change his defence in that way, but made him stick to the modus.

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Lord Mansfield.—None of the issues were tried. The reason why the second was not tried is, that they cannot prove a real composition by presuming a grant before 13 *Eliz.* But I am not satisfied of that. The judge thought he could not indorse a different custom, where an issue is directed without an order. It ought to be indorsed, and *valeat quantum valere potest*.

A rule for a new trial made absolute.

P. 21 Geo. III. A. D. 1781.

James Jackson Clerk, v. Thomas Walker, William Moore Newnham, John Bishop of Oxford and Robt. Allen. [Sir J. Skynner's MSS.]

LORD C. B.—The bill in this cause is brought by the plaintiff, who is vicar of *Farnham* in the county of *Surry*, for an account of the tithe of hops. The defendants *Walker* and *Newnham* are the executors of *George Woodroffe* esq. who was lessee of the rectory under the defendant the bishop of *Oxford*, as archdeacon of *Surry*, to which dignity it is annexed; the defendant *Allen* is an occupier.

The bill was originally brought against Mr. *Woodroffe* the lessee, and prayed to establish the right. But it being revived against his executors only, and the lease appearing to have been made to him and his heirs, that part of the relief is out of the question; and the bishop of *Oxford* is become an unnecessary party.

The plaintiff claims by *prescription* or *endowment*; he may entitle himself under *either*. Though no endowment appears, yet evidence which will not support a *prescription*, may be brought to prove an *endowment*. Endowments of vicarages have been in *general*, if not *all* of them, made since time of legal memory. Many of them are lost, and can only be proved by usage. It would be unreasonable to expect in such cases proof of a prescriptive right; for in many instances it would defeat the vicar's title. And if the vicar is permitted to supply the want of an endowment by such evidence of usage, as will not support a prescription, the rector must be permitted to oppose the vicar's claim of a prescriptive right, either by offering

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offering evidence which proves an endowment, or by shewing that the vicar's evidence adduced to support a prescriptive right applies to an endowment, not to a prescription.

Consider the evidence in the present case: there is no dispute about the facts: the question arises on the application of them. The vicar has received tithe of wood, and all small tithes, except of hops; which tithe has been divided between the vicar and rector. Tithe of hops in gardens, orchards, and coppice grounds, has been taken by the vicar; in the other places of the parish by the rector, who has likewise received tithe of corn, grain, and hay. The vicar insists, that he is entitled to tithe of hops, as a small tithe. For he insists, that, whether the usage is proof of a prescription or an endowment, it proves a right in the vicar to *all* small tithes, antecedent to the introduction of hops into the parish; which, as he collects from the evidence, was in the time of queen *Elizabeth*, and subsequent to the disabling statute: that the same construction must now be made, as would have been made on the vicar's evidence at the time of the introduction of hops into the parish, at which time the vicar had received *all* small tithes: and that where the vicar has been used to receive *all* small tithes, which have arisen in a parish, and a new tithable matter is introduced; if it is a small tithe, and there is no actual endowment, the vicar is entitled to it.

It is true, that where there is no endowment existing, and the vicar has been used to receive all the small tithes which have arisen, it is to be presumed that he is endowed of *all* small tithes; and, consequently, when a new tithable matter arises within the parish, it shall be presumed to have been comprized within the endowment: for that is the natural and necessary presumption which arises from such a usage, where no endowment appears.

But, whether that rule would have applied to the vicar's claim, if his claim had been made at the time of the actual introduction of hops into the parish, must have depended on the evidence, which might at that time have been produced. For at that time perhaps the endowment itself actually existed. It is certain that an endowment might then exist, either an original endowment, or an augmentation including specifically the tithe of hops, consistent with the usage which has since prevailed. I admit that the instrument of 1331 does not prove that the vicarage was not then endowed. For, as it has been truly said, the suggestions in a citation, (and that instrument amounts to no more), are not proof of the facts suggested. It must likewise be admitted, that it does not

appear, from any evidence in this cause, that the vicarage had been then endowed; or, if not, at what time afterwards it became so. What then is the presumption which naturally and necessarily arises from the usage in this parish? It is not that the vicar has, from time beyond memory, that is, by *prescription*, been entitled to *all* small tithes; for that is contrary to the usage by which the rector has continually received a part. It is not, that the *endowment* comprized *all* small tithes; for that is equally contrary to the usage; but the more natural presumption, because conformable to the continual usage, is, that the endowment itself was made, or some augmentation or modification of it, when by law it might, and when the introduction of hops, if not into the parish, yet into the country around it, made that species of tithable matter an object worthy of particular attention. For certain it is, that before the disabling statute of 13 *Eliz.* the cultivation of hops was greatly increasing. Whether they were introduced into this parish before or after that time cannot be collected with certainty, from any evidence in this cause. The account is only by tradition. And the rector and his lessee say in their answers, that they believe it will appear by depositions of witnesses, that they were first planted *in fields* there in 1586; but no such depositions, as are referred to, have been read in evidence. But, if the fact really was, that the increase of them had made such a progress in the parish in the 28th year of that reign, as that they were then planted *in fields* there, it is highly probable that before the 13th year of it, and, consequently, before the time when the final adjustment of the vicar's rights might have taken place there, they had found their way into *this* parish, as they did at first into *others*, by being planted in *gardens*. If that was the case, or even if they were become an object of attention there, though not actually introduced into the parish, when the final adjustment was made, a distribution of this particular species of tithe, conformable to the usage which has prevailed, was very obvious and natural; by which the vicar was to have all small tithes, with an exception or restriction of his right as to this new tithable matter; so much of which as should thereafter be planted in gardens, orchards, and coppice ground, which had used to yield tithe to the vicar, was to be tithable to him; and so much of it as should be planted in the open fields or places, which used to produce corn and grain, and which had yielded tithe to the rector, should be tithable to him.

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Supra 629.

Supra 749.

Supra 799.

If an endowment can be presumed, which is conformable to the usage, it is the duty of the court in the case of a usage, long and uninterrupted as the present is, to presume such an endowment. It has been at all times the rule of the court, where no endowment has appeared, to transcribe, as was pointedly said at the bar, the usage into an endowment, if it can be done. This rule must be applied with equal regard and attention to the claims of the rector as to those of the vicar. And therefore all those cases, which have been cited as authorities in the argument of the present question, to support the vicar's claim, are equally authorities in support of the rector's claim, if the usage has been in favour of it. For let those cases be considered. The first is the case of *Franklin v. The Master and Brethren of St. Cross*, which was cited from *Bunb.* 78. According to the report of the case in that book, the vicar was endowed generally of the small tithes. It was decreed, that he was thereby entitled to tithe of hops, though of growth since the endowment. If an endowment was produced, and it comprized all small tithes, there could be no question. For the tithe of hops being a small tithe, whenever hops were introduced, it must fall within it. But in fact, the case was otherwise. The endowment, which bore date in 1440, did not in terms comprize *all* small tithes. It endowed the vicar with the *altarage*. He had been used to receive *all* small tithes, and among them, tithe of hops, since their introduction into the parish, which had been for about twenty years. Under these circumstances, so favourable to the vicar's claim, the court did not, on the hearing of the cause, decree for him as to the article of hops; but directed a case to be stated and argued before them. What was the final determination upon that point, or whether any determination upon it was ever made, does not appear. And yet the merits of the question seem clearly to have been in his favour, as he was endowed of *altarage*, and had been used to receive *all* small tithes. In the case of *Vallis v. Pain and Underhill*, *Com.* 633. the question was merely whether clover-seed was a great or small tithe. For the vicar was clearly entitled to it, if a small tithe. And the usage as to that species of tithe was in favour of the vicar, whose predecessors had received it for fifty years. In the case of the Vicar of *Killington v. Trinity College in Cambridge*, which was in 1747, and is reported in *Wilf.* 170; though the endowment did not appear, yet it appeared from the survey of *Hen.* 8. that the vicar was entitled to *all* small tithes. And though the impropiator had received

agistment-tithe for fifty years; yet, before that time, it had been paid to the vicar. In delivering the opinion of the court, Lord Ch. Baron *Parker* expressed himself in terms which apply very strongly to the present case. If, says he, an endowment appears, that is the rule which we are to go by: if it does not, usage is the rule. Therefore, if there had not been this written evidence, *the payment to the impropiator for fifty years would be very strong evidence for him against the vicar*. But on the other side there is a record, which proves that the vicar is entitled to *all small tithes*. And the court decreed in favour of the vicar. I cannot help observing upon the words of Lord C. B. *Parker*, who had had great experience on this subject, that if there had not been the written evidence on the endowment, the payment to the impropiator for fifty years would have been very strong evidence for him against the vicar. And yet, in that case, as in this, the vicar had received every other species of small tithe. In the case of *Smith v. Huggins (i)*, which was in the Exchequer in 1752, there was an existing endowment, and upon that endowment the question must have been determined. For there appears to have been no usage in contradiction to the vicar's claim under the endowment. It is rather to be collected from the decree, which I have examined, that the usage as well as the endowment was in favour of the vicar. The last case determined upon this subject, and which seemed to be much relied on, was the case of *Cartwright v. Bailey*, decreed in this court in Dec. 1766. I have looked into the Decree-book, and I find that it was a suit for clover-feed by the vicar of *Wroxeter* in *Shropshire* against two occupiers; to which the rector was not a party. The vicar's right to *all small tithes* was admitted. The defendants said in their answer that they held the lands as tenants of the impropiator, and were

Supra 938.

(i) In that case the bill stated that plaintiff was vicar of *Alton* in 1740, and entitled to all small tithes, and prayed an account for tithe-hops. The defendant admitted the plaintiff to be vicar, but knew not his right to all small tithes; admitted occupation of 50 acres of hops, and non-payment to vicar, for that they were in no part of any garden, but in arable and meadow ground, for which tithe had always been paid to the impropiator and he held under the impropiator's lessee. The further answer added the value of the tithe. The amended bill stated the plaintiff entitled by usage, endowment, or otherwise, to all small tithes, except apples, lambs, wool, mills, and pannage. The evidence—The endowment out of the bishop's registry at *Winchester* was produced and read. The court being of opinion, that the plaintiff was well entitled to all the small tithes within the vicarage, except the apples, &c. decreed an account with costs.

1781. by agreement to hold them discharged from payment of all such tithes as belonged to the impropiator. They did not contend that this species of tithe had ever been received by the impropiator; but they insisted, that in several of the neighbouring parishes it was esteemed to be a great tithe. In this case the decree was pronounced as upon a right to *all* small tithes, admitted to be in the vicar, and without any circumstance to create any such doubt on his title, as to induce the court to think it necessary to order the impropiator to be made a party to the suit.

These are all the cases which have been referred to, and it appears, upon an examination of them, that in each of them, where there was no other evidence of an endowment, or where the vicar's right to *all* small tithes was not admitted, his right to the tithe in question was proved, either by a particular enjoyment of that species of tithes, or by a general usage of taking *all* small tithes, and that in no one of them had there been a usage in opposition to the vicar's right, except in the case of the vicar of *Kellington*, where the usage of taking tithe of agistment had been both ways; but the prior usage had been in favour of the vicar's right, and that right was proved by written evidence of an endowment; upon which evidence of endowment, according to the report of the case, the decree was founded.

But it is said, that though the usage which in the present case has prevailed in the parish, has been, as to the tithe in question, in opposition to the vicar's claim, yet it has proceeded from a mistake of the law.

That must depend on the facts. If from the facts in this case it must be presumed that the law has been mistaken, that may be a ground for the court to rectify such mistake. But the court will not in any case, unless on clear grounds, suppose such a mistake. Much less ought it to be supposed in the present case, in which it appears, that in an action brought against a predecessor of the vicar within twenty years after the time when it is said that hops were first planted in fields, he asserted his claim upon the record particularly and specifically to *all* tithe of hops throughout the parish, and yet that claim, as far as appears by the evidence in this cause, has not since been insisted upon. Such an acquiescence, after the claim had been in contemplation at such an early period, could have proceeded only from a conviction, that if it had
been

been farther insisted on, it could not *then* have been supported. If the usage can be reconciled to any right, which may be fairly presumed, the court ought to presume, according to the true principle of those cases which have been cited for the vicar, that it commenced in, and proceeded from, such right. Claims supported by long and uninterrupted usage ought not to be lightly done away. The argument in support of the vicar's claim, which supposes a mistake of the law, supposes, as the ground of such mistake, that no endowment of the vicarage, or augmentation of it, or any legal adjustment of the rights of the vicar, could have taken place after the time that hops became an object of attention. If that is true it would be an objection to the presumption, which the court would otherwise be induced to make. But it has been already observed, that the cultivation and consequential increase of hops were become an object even of legislative attention long before the disabling statute of 13th of *Eliz.* The usage, which has prevailed in this parish affords the strongest ground to presume that they had likewise become an object of particular attention *there* before that time, and before the final division of the tithes between the rector and the vicar had taken place. Such a presumption supposes the usage to have taken its rise from a clear right, and not from any mistake. It is therefore such a presumption, as it is the duty of the court to make. And the consequence of it is, that the tithe in question appearing to the court to belong to the rector, or his lessee, the vicar's bill must be dismissed.

P. 21 Geo. III. A. D. 1781. Scac.

Travis v. Chaloner, and others. [MS.]

THE plaintiff by his bill claimed tithes in kind of the defendants as occupiers of lands in the townships of *Great Sutton* and *Little Sutton* in the parish of *Eaflham* in *Cheshire*. The bill alleged the plaintiff's title thus, "that he was vicar of the parish, and as such entitled by endowment, prescription, usage, or otherwise, to the tithes in question in the townships of *Great Sutton* and *Little Sutton* in the parish of *Eaflham*, and the tithable places thereof." In support of this allegation proof was offered of the payment of tithe-hay in all other parts of the parish, *viz.* in kind where no tilth-penny, and a tilth-penny where none in kind. But it was objected,

Qu. Whether evidence of a general right, can be applied in support of an allegation of a partial right.

1781. that this proof was not admissible in support of this allegation; for that this was evidence of a general right throughout the parish, whereas the allegation was of a different right, namely, a portion of tithes in the townships named, and that the defendants might by such means be misled into a defence against a title very different from the title alleged by the plaintiff. The objection thus shaped was made by the court, though started in a somewhat different form by Mr. *Maddocks*. There being other evidence, viz. of terriers, rentals, &c. the plaintiff was permitted to go on with that, and the discussion of the objection reserved as matter of general importance (k). Afterwards on the same day was discovered and determined a point of evidence, viz. whether a verdict which had been given between the same vicar and other occupiers on the question, "whether the payment called the tilth-penny was paid and payable in lieu of tithe-hay," in which the affirmative was found, was admissible evidence in this cause. The objection was "*res inter alios acta*:" but the court said, that in these cases a decision between the vicar and one occupier was evidence in a case between the vicar and another occupier, and to exclude the evidence would end in the exclusion of nine-tenths of the evidence in this and all similar causes: but that the evidence was at the same time open to all imputation of fraud, collusion, mistake, &c.

A verdict between the parson and one occupier is evidence in a case upon the like point between the parson and another occupier.

M. 22 Geo. III. A. D. 1781. Seac.

Ashby v. Power. [MS.]

KENTON for the plaintiff.—This is an original bill by the rector of *Barwell* in *Lancashire*, now revived by his executrix, for subtraction of the tithes of grain, peas, beans, and hay. There is no controversy respecting his character of rector: the occupation and tithable matters are also admitted. The defence is, moduses. It is allowed that money payments have been long paid, but we insist they are rank. Few of these payments are less than 1 s. an acre: many of them above that sum. They must therefore have been only temporary compositions within time of memory. Besides, these pay-

(k) The court gave judgement in favour of the plaintiff without disposing of this objection, there being other evidence in the cause sufficient to ground their determination.

ments taken together amount to 300 l. *per annum*, whereas the value of the living in 26 H. 8. in the *Liber Valorum* appears to be only 21 l. 16 s. It is not expedient that a fact so clear should be sent to the prejudices, not the judgement of a jury. Besides this, a bill was filed in 1680 odd by the rector against an occupier, where the occupier set up a modus different from the present. There is likewise a terrier of 1697 stating the rector to be entitled to all tithes great and small, and making mention of a rate-tithe of 40 s. in one district, whence we infer that no such existed in the rest of the parish.

1781.

[On the offer to read the above bill and answer, it was objected that nothing appeared to have been done in consequence of the answer, and the lands could not be identified. But this was answered by saying that there was evidence to shew that the whole of the now defendant's lands were in the occupation of the former defendant. And the court held it to be admissible, if the lands could be identified. Depositions were read for that purpose; but these being too loose, the answer was rejected.—To shew the magnitude of the present value, the plaintiff gave evidence of assessments of the tithe to the poor rates, which on debate was admitted: but the assessments from some townships only being produced, it amounted to nothing.]

Arden S. S. insisted on the valuation in the time of H. 8. which, though not to be construed with great strictness, was here decisive where the moduses amount to 67 l. None of the receipts state the payments to be moduses. Here is nothing but the belief of the witnesses that the payments were immemorially paid: they are not said either to be paid or accepted as moduses. One defendant pays at the rate of 10 $\frac{1}{4}$ d. several at 1 s. and upwards, some at 2 s. No tithe having been taken is a proof that the rector has generally let his tithe. We therefore pray a decree without an issue. We desire no other indulgence to the church than is shewn to laymen. In the case of a layman, a payment of rent is presumed to be for a tenancy at will, or from year to year, unless the contrary be proved; so ought it to be presumed in this case, that the payments to the rector were temporary, determinable payments, and not moduses, unless proved to be such.

Qu.

Hill Serj. contr. insisted, that even an issue ought not to be directed in this case, but that the bill should be dismissed. The rector accepted the payments twenty years together, gave notice before *Michaelmas* 1776, filed his bill for tithe due *Michaelmas* 1777, and died in

1781.

1778. Will then the court admit an executrix to bring this bill, and have issues for the difference between the value of one year's tithe, and the money payments? In *Richards v. Evans*, 1 *Vez.* 40. Lord Hardwicke said he would have dismissed the bill if no cross-bill had been filed: but this case is far more oppressive and vexatious, and more fit for dismissal than that case. But, if the court should not be disposed to dismiss the bill, at least issues are proper. The payments are only objectionable on the score of rankness: but that is an objection of fact proper for the determination of a jury. *Giffard v. Webb*, *Posle v. Gardiner*, *Sanfom v. Shaw*, and *Twells v. Welby*, are all authorities to this point. Rankness is only evidence of the non-existence of the modus from time immemorial; for if there were proof that it had so existed, the modus would be good, however large it might be. As to the valuations, they are of no force: there were two valuations, one in the 19 & 20 *E. 1.* some mistakingly call it the 29 *E. 1.*, the other in the 26 *H. 8.* Now the valuation in 19 & 20 *E. 1.* is 24 l. though the other is 21 l. The great variety in the coin of this kingdom is one strong reason against giving much weight to apparent rankness; for a pound formerly was a lb. weight. A mark was of different value in different periods. Lord Coke, in his comment on the statute of *Gloster*, says 40 s. was then something more than three times what it is now. At the time of the second valuation there were 48 s. to the pound; at the time of the first, 20 s. so that in the time of *E. 1.* the valuation was in effect returned double as high as in *H. 8.*'s valuation. This proves the valuation of *H. 8.* to be greatly below the real value. The clergy understanding the design of the valuation, took care to have the value much under rated. So on the suppression of the monasteries, the rating was extremely low. So were the rents: there are many instances of the letting out on old leases at 35, 45, and 55 l. yet the valuation of *H. 8.* only at 5 l. Perhaps too the present value may arise from bequests to the rectory since the time of *H. 8.* That valuation in truth affords no rule even for probable conjecture. It is objected, that the witnesses do not prove the payments to be moduses: but they prove the antiquity of those payments, and their opinion of them. The subject matter will only admit of belief: nothing further can ever be sworn with propriety. It is objected too, that the receipts do not call these payments moduses: but the parishioners cannot compel the rector to call them so, and to keep evidence of payments they must be content to take any the rector will give. A
similar

similar objection was over-ruled in *Chapman v. Smith*, 2 *Vez.* 506. It is objected, that the farms for which, &c. are ancient farms; but there is such evidence. The terrier is very slight: only signed by two inhabitants, and those two in one hand-writing.

Arden in reply.—As to the case of *Richards v. Evans* which was cited to shew that the bill ought to be dismissed, it is observable, that in that case there was the rector's own admission of the immemoriality of the payment. Nor is there any case in fact where a bill has been dismissed, where the modus was contested by the plaintiff, and he was willing to try it at law. And the present plaintiff has no remedy elsewhere for much of her demand. In *Curte v. Ball*, 1 *Vez.* 3. a bill was brought by the administrator of a vicar, who had never pretended a right to the tithes in kind, and yet the bill was not dismissed. As to the merits, it is true, that rankness is matter of fact, not of law, that is, it is evidence of non-immemoriality. But this is not a case of payment of so much an acre in a part of the parish, but of particular sums for particular farms. Now, though I admit the *valor* not to be precisely accurate, yet it is impossible there could be such a variance. And as to the survey of pope *Nicholas*, though it be 31. less than that of *H.* 8. yet still, the modus could not then exist, that is, 67 l. could not be paid as a part of 21 l. any more than as a part of 24 l. As to the difference of the valuation impeaching the accuracy of the surveys, it has no such effect; for *non constat* that *ecclesia de Barwell* at the two periods consisted wholly of the same particulars. It must be admitted according to the case of *Chapman v. Smith*, that the receipts not calling it a modus is not conclusive, because the parishioners cannot oblige the rector to call it any thing, or give any receipt at all: but the parishioners are not obliged to take a receipt making against them, and therefore when accepted it furnishes a strong inference. It has been said that the terrier proves but little, but this will be found upon examination to be clearly otherwise, and that it proves a great deal. It has been said, that there is no case where issues have been refused upon a farm modus: but *Ekins v. Piggott*, 3 *Atk.* 298. is a strong case against this proposition: in that case Lord *Hardwicke* decreed for tithes without directing an issue, on account of the rankness of the modus, the modus alleged being 48 l. and the manor at the then present time being only worth 80 l. *per annum*. As to the receipts, in one it is expressed to be for two quarters, whereas the modus alleged is a half-yearly modus;

Tr. 22 Geo. III. A. D. 1782. Scac.

Oglander v. Lord Pomfret. [Eyre's MS.]'

An endowment may be narrowed by usage.

THE bill stated, that the warden and the scholars of *New College* in *Oxford* were impropriators of *East Neston* and *Hulcot* in *Northamptonshire*, and entitled to the tithes of corn, grain, and hay yearly arising throughout the said parish; that by indenture dated the 19th of *December* 1707 they demised the same to lord *Lempster*, afterwards earl of *Pomfret*, for ten years at four pounds a year; that he entered thereupon, and took the tithes thereof as aforesaid to his death in 1753; that his son then entered, and had ever since received the same, as lessee of the college, up to *Michaelmas* 1778; that the said earl had been for some years past the owner of all or most of the lands in the parish; that particularly in *December* 1778 he occupied divers parts of them; and that the defendants, as tenants to him, held the remainder; that the plaintiffs being minded to take in kind the tithes arising from the lands in the defendant's occupation, gave them respectively due notices in writing, that after the expiration of the year 1778 the plaintiffs would take their tithes of hay, corn, and grain in kind. The bill then charged, that the defendants respectively in 1779 had reaped, mowed, and taken upon and from off the said lands wheat, barley, oats, rye, peas, beans, and hay. The bill further charged, that the plaintiffs, as impropriators, on the 3d of *December* 1777, gave the earl of *Pomfret* notice in writing to quit and yield up to them upon the 10th of *October* then next the said rectory and premises and all the tithes of corn, grain, and hay, growing in *East Neston* and *Hulcot*, or elsewhere, to the said rectory belonging; that he persisted in refusing to account with them, or make any satisfaction; and that he had forbidden the defendants the tenants to account. The bill further stated, that the defendant *Lawford* claimed to be entitled, as vicar, to the tithe of hay arising in the parish. The bill then prayed, that the defendants might account for the single value of the tithes of the corn, grain, and hay, which they respectively had taken from off their said lands, and pay what should appear to be due on such account.

The defendant *T. Inns* and others said, that they knew not of the lease in the bill mentioned, or by what tenure earl *Pomfret* held the

the tithes; but that the lands by them holden in the parish of *East Neston* were either exempted from the payment of any tithes whatsoever, or the tithes thereof had been purchased by the earl's ancestor's, and the occupation of the lands granted tithe-free, for that no species of tithes had been demanded of them for the said lands until the delivery of the said notices on the 12th of *December* 1778 and the 5th of *November* 1779. They admitted, that the earl had desired them to set out their tithes of corn and grain for 1780 and for all future years; but denied that the plaintiffs had any right to the tithes of hay or grafs arising on their said lands.

The defendant the earl of *Pomfret* denied that the plaintiffs were, to his knowledge, impropiators of the rectory, and entitled to the tithes of corn and grain; and said that the vicar was entitled to all tithes, except the tithes of corn and grain. He also denied all knowledge of the lease dated the 19th of *December* 1707; and insisted, that if any such lease had been granted to lord *Lempster*, he had received the tithes of hay by virtue thereof. He admitted, that after the death of lord *Lempster* in 1711, and of his, this defendant's father, he had entered upon the said rectory, and had received all the tithes of corn and grain belonging thereto, as the tenant of the plaintiffs, at a yearly rent from 11 l. to 15 l. according to the price of corn at *Oxford* market, and that he did not hold the same upon the terms mentioned in the bill; and he averred, that he had paid his rents to the plaintiffs up to *Michaelmas* 1778. He also admitted, that for several years past he had been owner of all or most of the lands in the parish; that in *December* 1778 he occupied several acres of his lands; that the plaintiffs caused the notice to be delivered to him as stated in the bill; that in 1779 he occupied several acres of meadow land, and grew and cut thereon hay, but no corn or grain: and he submitted to make the plaintiffs a satisfaction for the value of the said tithes of hay, in case they were entitled to the same. He admitted that the plaintiffs, about the 3d of *December* 1777, caused such notice to be given to him as stated in the bill; but denied that he had entered into any negotiation for a renewal of the said lease; and said, that he had considered such notice as one to set out his tithes of hay, corn, and grain in kind, after the 10th of *October* next ensuing the date of the same.

The defendant, *Lawford*, said that the plaintiffs were seised of the impropriate rectory, and entitled to receive the tithes of corn and grain throughout the parish; but denied that they were entitled

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to receive the tithes of hay therein ; and insisted that he, as vicar, was entitled, by endowment, prescription, or usage, to the tithes of hay, and to all other tithes whatsoever arising throughout the said parish, except the tithes of corn and grain.

The plaintiffs replied, the defendants rejoined, and witnesses were examined on the part of the plaintiffs only.

Lord Chief Baron.—In this case the general title to the rectory is not controverted ; so that the common law right is with the plaintiffs as to the tithe of hay. But the vicar claims this species of tithe under an endowment, which gives him all the tithes in the parish, *decimis garbarum duntaxat exceptis*. “*Consistit etiam in omnimodis decimis ad dict. eccl. provenient decim. garbarum duntaxat except.*” The word *garba* may be taken in an enlarged or a limited sense, according to usage. The plaintiffs have given evidence of the perception of this species of tithe by the rector. For by the minister’s accounts in 1536, and 1539, which have been produced, tithe of hay was in charge as belonging to the rectory, parcel of the possessions of the dissolved monastery of *Sewardesley* in the county of *Northampton*. In 1537 the rectory was demised by the crown to one *J. Brooke*. In 1550 king *Edw. 6.* granted the rectory to two persons, of the names of *Rogers* and *Veale*, with general words ; and under that grant the plaintiffs derive their title.

It appears that the ancestors of the defendant, lord *Pomfret*, were farmers of the rectory under the plaintiffs at an old rent, part in money, and part a corn rent ; but there has been no perception by them of the tithe of hay in kind ; for lord *Pomfret* and his ancestors have been owners of almost all the lands in the parish, and have demised them to their tenants tithe free. This puts then lord *Pomfret*, the plaintiff’s tenant, in possession of the tithe of hay. This therefore is an enjoyment of that species of tithe by the plaintiffs themselves. To encounter this there is no evidence on the vicar’s part of enjoyment ; nor has he any title, unless the necessary construction of the endowment give him a title. But there can be no such necessary construction as against the usage, because it depends upon words of doubtful sense, which the usage is to fix ; and here the usage has fixed a sense on them against the vicar.

P. 23 Geo. III. A. D. 1783. Scac.

Payne v. Powlett. [MS.]

THE vicar of *Buckland Newton*, otherwise *Buckland Abbas*, in the county of *Dorset* claimed the small tithes arising therein, and stated that the defendants, the dean and chapter of *Wells*, were impropiators of the rectory, and entitled to the tithes of corn, grain, hay, and wood; that they being so entitled, did, before 1770, lease the same to the defendant *Anne Powlett*; that since the said year, many of the landholders in the parish, and particularly the defendant *Pople*, had sown their lands with clover and other grafs-seeds, which they had threshed for seed; that the tithe thereof being a small tithe ought to have been paid to the plaintiff as vicar; but that the lessee of the rectory had, since the said year, received the said tithes of clover-seeds and other seeds, and pretended that he was entitled thereto, as lessee as aforesaid. The bill therefore prayed, that the plaintiff's right to the said tithes might be established; that the defendant *H. Pople* might pay him the said tithe which had become due since the year 1770; and that the defendant *Powlett* might repay him for all the tithe of seed he had since the said year received from any of the landholders in the parish.

The dean and chapter of *Wells* said, that they were impropiators of the rectory, and entitled to all tithes whatsoever thereto belonging, and also to the right of presentation to the vicarage; that the same, before the year 1770, had been in lease to the defendant *Powlett*; that the vicarage was many years since endowed with some of the tithes arising within the parish; that the plaintiff was, in 1766, duly presented thereto, and had, by himself and curate, performed the duties thereof; that the defendant *Powlett* claimed, by virtue of the lease of the said rectory impropriate, to be entitled to the tithes of all clover and grafs-seeds, as part of the tithes belonging to such rectory; that he had received such tithes, or some satisfaction for the same, from all or most of the occupiers of lands in the parish; but that, as they had never received the tithes belonging to the rectory, they could not say whether such kind of tithes belonged to them as rectors, to the defendant *Powlett* as their lessee, or to the plaintiff as vicar; and that they therefore left the plaintiff to make such proof as he should be able in support of his claim;

Where there is no written endowment, and the vicar has been in the perception of all other small tithes, the court will presume him entitled to all small tithes of modern introduction.

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claim; but they insisted that they, as rectors, or their lessee, were entitled to such tithes, unless the plaintiff should make out a right thereto in a legal and proper manner.

The defendant, *Anne Powlett*, denied that the vicar was entitled to all small tithes in the parish; and insisted that he was entitled to the tithes of hemp, clover-feed, and all other grass-seeds, of what nature or kind soever, and whether the tithes thereof were great or small. He admitted that the rectory was impropriated, and the vicarage endowed; and insisted that the impropriator was entitled not only to the tithes of corn, grain, hay, and wood, but also to the tithes of hemp and of grass-seeds; and that the vicars had only, from the time of their endowment, received all other small tithes; and that hemp and grass-seeds not being recited in the endowment, he was not entitled thereto. He admitted the receipt of the tithes, as stated in the bill, and said that he was not compellable to account until the plaintiff should have fully established his right to the tithes in question.

The defendant, *H. Pople*, said that clover and other grass had, for many years past, been permitted to stand for seed in the said parish, and had then been cut and threshed for seed; that the tithes of all such clover and other grass-seeds had been constantly claimed by the lessee of the rectory, as part of the tithes belonging thereto; and that the tithes thereof had been constantly delivered in kind, or compounded for with the said lessee; that neither the plaintiff, nor any other vicar of the parish, had ever received any tithe for any such clover or other grass, or any satisfaction for the same, or had ever claimed any such tithe, until the plaintiff thought fit to set up a claim thereto. He set forth an account of the clover and other grass-seeds which had arisen on the lands in his occupation; and insisted, that he was not liable to make the plaintiff any satisfaction for the tithe thereof.

The plaintiff replied, the defendants rejoined, and witnesses were examined on the part of the plaintiff, and the defendant *Anne Powlett* only; and the cause came on to be heard the 8th day of May 1783; when, upon hearing the counsel for all parties, and reading several of the proofs taken in the cause, the court gave judgement.

Lord C. B.—This case is exactly within the reason of former cases. Where there is no endowment, and all other species of small tithes have been usually received by the vicar, it is a reasonable ground of presumption that he is entitled to all modern species of small tithes.

Eyre,

Eyre B.—*Cartwright v. Bailey* ought to govern this case. The usage must govern. The only evidence in the way of presumption of a general endowment is capable of an explanation that takes away the effect of it. It is a receipt by the rector for clover-feed. But that is explained by the notion that clover-feed was a great tithe; it was received therefore under a mistake.

Perryn B.—*Cartwright v. Bailey* is in point.

After the hearing a terrier was found, in which (*inter alia*) was the following passage: "The vicar, entitled to all tithes, the tithes of wood, corn, grain, hay, and hemp only excepted." The court thought it operated with the plaintiff rather than otherwise.

They therefore ordered the bill as against the dean and chapter to be dismissed with costs; and they further ordered the Deputy Remembrancer to take an account of what was due to the plaintiff from the defendants, *Powlett* and *Pople*, for the titable matters demanded by the bill for six years previous to the filing thereof; that the same be taken as against *Anne Powlett* for the money by him received for the said titable matters, and as against *H. Pople* for the titable matters which had arisen on the ground in his occupation, with costs.

The court now ordered the Deputy Remembrancer to take an account of what was due for the tithes of corn, grain, and hay, which the defendants *Inns, Ward, Hill, and White*, four of the occupiers, had on the farms in their respective occupations from the time demanded by the bill; and also an account of what was due for the like period in respect of the tithes of hay which the defendants the earl of *Pomfret, Dunckley, Adkins, Clark, and Davis*, had taken from the farms in their occupations.

But it appearing to the court, that the earl of *Pomfret, Dunckley, Adkins, Clark, and Davis*, had not any tithes of corn and grain for which the plaintiffs sought an account, it was further ordered, that so much of the bill as required the last named defendants to set forth an account of the said tithes of corn or grain be dismissed with costs.

The court further ordered the bill as against *Lawford* to be dismissed, but without costs.

The court further ordered the several other defendants to pay their costs, except the costs of the tithes of corn or grain demanded by the bill from the earl of *Pomfret, &c.*

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. Tr. 23 Geo. III. A. D. 1783.

Scott D. D. v. Fenwick and others. [Sir J. Skynner's MSS.]

THIS cause was heard in *Michaelmas* 1783, and at the sittings after that term, and in *Easter* 1784. And in *Trinity* term 1784, the Lord Chief Baron delivered the judgement of the court to the following effect :

Lord C. B.—This bill is brought by the plaintiff, Dr. *Scott*, Rector of *Simonbourn* in the county of *Northumberland*, praying an account against several of the defendants of tithe of milk, and against other of the defendants an account of tithe of agistment.

The defendants against whom the account of tithe of milk is prayed, and who occupy farms in the district of *Bellingham* within the parish of *Simonbourn*, say in their answers, that by immemorial custom the several occupiers of messuages, farms, lands, or grounds, in and throughout the rectory and parish, including the chapelry of *Bellingham*, have been used to pay to the rectors yearly certain sums in lieu of tithe of milk produced from the cows kept on their several farms, *i. e.* for each of such cows, not producing a calf, called a *farrow cow*, the sum of three-halfpence ; and for each of such cows, producing a calf in the same year, called a *new keld cow*, in case the calves dropped from the *new keld cows* belonging to or fed or depastured by such occupiers do not in the same year amount to five or more, the sum of two-pence ; if to five or more, the sum of three-halfpence ; payable at *Easter-Monday*, in lieu of the tithe of milk produced from such *farrow* or *new keld cows*, according to the several cases and events aforesaid.

The defendant *Thomas Charlton* says in his answer, that he occupies an ancient tenement in the chapelry of *Bellingham* ; that by ancient custom the sum of one-penny hath been yearly paid to the occupiers of every ancient tenement or farm within the chapelry and throughout the parish, for and in lieu of all tithe of grass yearly growing on the same, whether eaten and consumed by the mouth of cattle, sheep, or any other living goods, or cut, cured, and made into hay.

The defendant *John Robson*, who occupies two ancient tenements in the chapelry of *Bellingham*, and the defendant *Allen Macdonald*, who occupies six ancient tenements in that chapelry, insist on the like modus of one-penny, payable for and in lieu of the tithe of

grafs yearly arising on their respective farms; whether it be cut and made into hay, or eaten by barren and unprofitable cattle.

The defendant *Thomas Charlton* insists on an ancient payment of four-pence for each score or twenty lambs taken in or permitted by any occupier of any lands in *Bellingham* to depasture, for the summering or *spaining* thereof for the time aforesaid, or for the usual time deemed proper for that purpose, and which yield no wool or lamb, in lieu of the tithe of lamb and wool.

The defendant *Joseph Wilkinson* says, that he has occupied jointly with his brother (but each of them depasturing his own cattle separately) lands in the district of *Simonbourn*, late parcel of *Simonbourn* common, which, upon a late division of the said common, were set out and allotted to *Thomas Ridley*, in respect of an ancient estate in the said parish having right of common thereon; and that from time beyond memory one-penny hath been annually payable at *Easter* by the owners and occupiers of the said *Thomas Ridley's* ancient estate having right of common on *Simonbourn* common (in respect of which estate, as being an ancient tenement, called *Slaterfield*, the said lands occupied by the defendant were set out or allotted) to the rector for the time being, as a modus for or in lieu of the tithes of grafs arising either in or upon the said ancient estate and the lands thereto belonging, or any waste, moor, or common in right or in respect thereof, whether such commons, wastes, or moors, were or should be divided or allotted, or permitted to continue undivided or unallotted; and whether the said grafs or any part thereof be cut or made into hay; or, whether it be eaten by barren or unprofitable cattle.

The defendant *Humphrey Thompson* says in his answer, that he occupies lands, which were lately part of certain other moors or commons in the district of *Simonbourn*, and were upon a late division thereof set out and allotted in respect of certain ancient estates, which he particularly names, having a right of common thereon, or on one of them; and he insists, that a modus of one-penny for each of the said ancient estates, and the lands and grounds, and also the moors and commons thereto respectively belonging, so by him holden and occupied, hath been payable yearly by the owners or occupiers thereof, and, consequently, for the lands and grounds in his occupation, in lieu of tithe of grafs arising on his last mentioned grounds and lands, whether it be cut and made into hay, or be eaten by barren and unprofitable cattle.

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An issue cannot be directed where the evidence shews a different modus than that alleged; neither can there be in such a case a decree for the tithe in kind which the modus affects to cover.

These are the defences of each of the defendants in this cause.

As to the demand of tithe of milk, the defendants, who are liable to that demand, have not proved the modus of two-pence for every *new keld cow*, and three-halfpence for every *farrow cow*, which they have alleged by their answers to be payable in lieu and satisfaction of the tithe of milk. It was stated by their counsel, that though they had failed in giving satisfactory proof of the modus, which they had alleged; and which, it was said, they had alleged through mistake or ignorance of another modus, which actually existed, and had been always paid in the district of *Bellingham*, in lieu of that tithe; yet that they had sufficiently proved the existence of the other modus; and they proposed to read the depositions of several witnesses to prove that a modus of four-pence has been always payable and paid by the occupiers of ancient estates or farms, in that district, in lieu of such tithe arising from such estates or farms. This evidence was objected to on the part of the plaintiff, as being evidence of a modus, which the defendants had not alleged in their answers, and therefore ought not to be received or read on their behalf. The court was of opinion, that the defendants having in their answers insisted on a particular modus, could not be permitted to enter into and read proof of another, or different modus; and the evidence proposed was not received. In the farther hearing of the cause the plaintiff's counsel thought it expedient, in order to take off the effect of some evidence read for the defendant, to read on the part of the plaintiff (as they were entitled to do) those depositions, which they had objected to, when they were offered to be read on behalf of the defendants. From those depositions it appears, that a payment of four-pence yearly has been immemorially made by the respective occupiers of ancient estates or farms in the district of *Bellingham* to the rector; and there is a great deal of proof from reputation, from tradition, from the frequent declarations of the tithe-gatherer, and from the declarations of the last rector, that the four-pence have been paid for the tithe of milk. There is no satisfactory proof given on the part of the plaintiff to shew that the four-pence have been paid on any other account. For, as to the deposition of Mr. *Fleming*, the curate, it is far from satisfactory; and it is directly contradicted by the declarations of *Maire*, the tithe-gatherer, and of Mr. *Wastell*, the late rector, who expressly admitted, that the payment was not
for

for keeping a book as Mr. *Fleming* supposes, but for the milk of cows. And it is remarkable, that Mr. *Wassell's* declaration on that subject was made in the latter part of his time; and that he had been rector of the parish from the year 1723 to the year 1771, when the plaintiff, Dr. *Scott*, succeeded to the rectory.

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Under these circumstances the plaintiff's demand of tithe of milk in kind now stands. The court cannot direct an issue to try the existence of a modus on the behalf of the defendants, which the defendants have not alleged in their answers. The court ought not to decree an account of tithe in kind on the behalf of the plaintiff, in direct contradiction to so much and such strong proof of a modus payable in lieu of the tithe, and that proof arising from evidence read on the plaintiff's part. The bill, therefore, as to such part of it as prays an account of the tithe of milk must be dismissed.

As to the demand of tithe of agistment, which is made upon five of the defendants; three of them, namely the defendants, *Charlton*, *Robson*, and *Macdonald*, who occupy ancient tenements or farms in the district of *Bellingham*, insist on a modus of one penny payable for each of their tenements or farms in lieu of the tithe of grass, whether cut and made into hay, or eaten by barren and unprofitable cattle, as two of the defendants say; or, as the other says, eaten by cattle, sheep, or any other living goods. It is in proof, that payments have been continually made for the tithe of agistment of sheep and lambs throughout the whole district, independently on, and without regard to any custom or usage regulating such payments. There cannot, therefore, be a modus of one penny, or any modus payable for or in satisfaction of the agistment of *all* barren and unprofitable cattle. If there is *any* modus for agistment, it must be with some restriction. But the court does not, as was proposed by the defendant's counsel, direct an issue to try a modus with a restriction or exception, where the defendants have insisted on a modus generally, and without any restriction or exception; for that would be to try a modus different from that which the defendants have made the ground of their defence. As to these defendants, therefore, who occupy ancient farms in *Bellingham*, they must, in this cause, be decreed to account for their agistment tithes.

Where a modus is alleged generally, and without any restriction, the court cannot direct an issue to try one with a restriction.

As to the modus insisted on by the other two defendants, *Wilkinson* and *Thompson*, to be payable for tithe of hay and agistment of their several inclosed lands in the district of *Simonbourn*, which were part of wastes or commons, and which were, on the inclosure of those wastes or commons, allotted to different farms in *Simonbourn*,

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in satisfaction of the right of common which the occupiers of those farms enjoyed on the wastes; it is admitted, that payments for tithe of agistment of sheep and lamb, without regard to any usage or custom, have been continually made in the district of *Simonbourn*, as well as in the district of *Bellingham*; and there is, consequently, the same objection to the modus, as claimed for these new-inclosed lands in the district of *Simonbourn*, as there is to the like modus claimed for the old inclosures in the district of *Bellingham*.

A modus of so much a year payable by the occupiers of ancient tenements for the tithe of hay from commons, is void on the face of it.

But, putting this objection out of the case, the modus, as it is alleged, *i. e.* for *hay* and agistment, cannot be supported. It is not proved, that by any usage or custom antecedent to the time when the inclosures were made, any modus was paid in lieu of any tithes arising on the commons; and the usage since the inclosure has been, as to these allotted lands, in direct contradiction to such a modus; for tithe in kind has been paid for these lands, both of hay and agistment. Nor does it appear that any agreement was made with the rector, at the time of the inclosure, respecting the payment of any modus for tithes, or for saving the rights of the owners of the farms over the lands when they should be inclosed; and without some agreement it might be a question, which it is not now necessary to discuss, Whether the modus was not extinguished by the inclosure? But, supposing that by usage antecedent to the inclosure, a modus of one penny had been paid for the farms and the commons, it could not have been paid for hay on the commons; for the commons, from the nature of them, and of the rights over them, could not have produced hay. Such a usage could not have afforded a presumption of any ancient agreement on the part of the rector to receive, and on the part of the owners of the farms to pay, an annual sum in lieu of the tithe of a tithable matter, which, at the time of making it, could not have been in contemplation of either of the parties, as the subject of their agreement, and over which one of the parties had no right. For, supposing the ancient rights of the owners of the farms to have been continued after the inclosure; yet the right of the owners of the farms could not, before the inclosure, be extended to any exemption from payment of tithe of hay; because, if hay had been produced on any part of the common, it would not have belonged to the owners of the farms who paid the modus, but to the owner of the land on which it grew, who was the lord of the waste. Considered in any light, this modus, in the manner it is alleged, for *hay* and agistment, cannot be supported.

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As to the modus which the defendant, *Charlton*, has alleged to be payable for lambs, four-pence for each score taken in to depasture in *Bellingham*; if it be considered as a modus for tithe of agistment (which in fact it must be if any such modus for lambs exists), it is inconsistent with the modus of one penny for hay and agistment of *all* barren and unprofitable cattle. To avoid this inconsistency, he has alleged it to be payable for tithe of wool and lamb, though wool and lamb are not produced. But for whatever it be alleged to be payable, the payments for lambs depastured appear by the evidence to have been so various in such a number of instances as to exclude all presumption of a modus.

Decreed, that so much of the bill as prayed an account of tithe of milk should be dismissed; and that the defendants who had cattle should account for the tithe of agistment, without costs on either side.

In this case an objection was made to the evidence of a witness, because it appeared on his cross-examination that he was interested. It was answered to an interrogatory asking the witness, Whether he is interested or not, that, he answers in the negative. After this the party proceeds in his cross-examination, and thereby makes him a competent witness. *Per cur.*—At law the old rule was, that the witness must be rejected, if at all, on the *voir dire* before the examination in chief began; and after such examination once commenced, the adverse party could object to his credibility only, and not to his competency. But this rule was found inconvenient, because it often happened, that an interest denied on the *voir dire* came out clearly on a cross-examination. The court therefore have, for a long time past, permitted the objection to prevail whenever the interest appeared in the course of the examination, provided the party entitled to the benefit of the objection urged it immediately; still holding, that if after the ground of objection appeared the party proceeds in his cross-examination, he thereby waives the objection, and shall not afterwards have liberty to make it. The rule of evidence in equity ought to be analogous to that in courts of law. When the interrogatories are drawn, it is impossible for the party to know what answers the witness will give to them, consequently, there is no opportunity of stopping in the course of the cross-examination, and of urging the objection, till after the depositions are published, and the evidence comes to be read in court. Then, if the party permits the evidence to be read, he thereby waives the objection to the competency of the witness; but, if he uses the first

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opportunity that offers, by urging it at the hearing before the evidence is read, it ought to be admitted and to prevail. If this is not the rule of evidence in courts of equity, it is time that the question should be mooted, and that it should now be established one way or the other.

Tr. 24 Geo. III. A. D. 1784. Scac.

Gaches v. Haynes. [MS.]

The tithe of
mills may
in some
cases be
considered
as predial.

BILL by the vicar of *Weston Wawen* in the county of *Warwick*, for an account of the tithe of a water corn-mill for fifteen years. The defendant denies the vicar's right to the tithe of ancient mills, whether of lately erected mills, submits to the judgement of the court. He then sets forth an act of parliament passed in 15 G. 3. for inclosing the common fields in this parish, by which it was enacted, that the commissioners under that act should allot to the plaintiff and his successors, vicars, &c. (exclusive of the lands to be allotted to the plaintiff in lieu of his glebe lands), such parcel of the lands in the common fields directed to be inclosed, as the commissioners, making such allotment, should think and adjudge to be a full equivalent and compensation for the vicarial tithes of the said common fields in the said parish, after the rate of nine-pence in the pound of the real and true annual value of the said common fields at the time of making the allotment. And further, that the commissioners at the request and with the consent in writing of the vicar, or any proprietor of any old inclosed farms or lands in the parish, should ascertain and fix by their award such a yearly rent or sum upon and payable from each of the said old inclosed farms and lands, and the respective proprietors thereof for the time being, as in the judgement of such commissioners should amount to full 9 d. in the pound of the real and true annual value of the said respective old inclosed farms at the time of making the said allotments for and in lieu of the vicarial or small tithes payable in respect thereof, which rents should be payable, &c. It was also enacted, that after such division, and the execution of the award, all right of common, and all great and small tithes for or in respect of the old inclosures, messuages, cottages, tenements, gardens, and orchards, for which there had been any allotment made, or any sum appointed to be paid, and also of the lands and grounds thereby directed to be inclosed, should cease and be for ever extinguished.

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He then sets forth an award made by the commissioners by which (*inter al.*) they ascertained the yearly rents or sums payable out of the old inclosed farms, and from the proprietors or occupiers thereof, and they thereby ordered *Peter Holford* esq. the proprietor of the farm and lands in question in the occupation of the defendant, in lieu of the vicarial tithes of such farm and lands, the yearly rent of 6 l. 19 s. 1 d. He saith that the mill in question was an ancient mill, but in 1780 was moved one hundred yards down the stream: that if any tithe were due for it, the same is extinguished by the award of 6 l. 19 s. 1 d. in lieu of the tithe of the old inclosure on which such mill stood, the said 6 l. 19 s. 1 d. being 9 d. in the pound of the rent of the said inclosure, including the said mill: that the award was made according to the tenor of the act and with the consent of the vicar.

Mansfield for the plaintiff insisted (*inter al.*) that the tithe of mills was a personal tithe; that it is not payable in respect of the land on which the mill stands: that a mill's being built upon lands exempt from tithes did not protect it: that in the case of *Thomas v. Price* (*supra* 871.) where a mill which stood upon ancient lands which were exempt from the payment of tithes, was taken down and erected anew on lands alike exempt, an account was directed: that the mode of compensation in this case negatives the idea of its being a satisfaction for the tithe of mills; that 9 d. in the pound or the annual value was not a mode of computing a compensation for the tithe of mills; that there was a proviso in the act, that it should not defeat the right or title to tithe-wood, or to vicarial tithes of old inclosures within the parish, in lieu whereof no sum or compensation was awarded, nor to any oblations, mortuaries, *Easter* offerings, or surplice fees, but that the same should remain due and payable; that the operation of this proviso was, that nothing was to be discharged of tithes by the act, for which a compensation could not be made.

Burton for the defendant argued that the case of *Thomas v. Price* was not *ad idem*; for there an absolute, not a qualified exemption was claimed, and the courts are more rigorous respecting absolute exemptions: that in the case of *Russell and Moor*, 1 Ro. Abr. 651. pl. 1. if a man prescribes to pay to the parson a certain thing as a modus for all the demesnes of his manor of D. and afterwards erects a windmill upon part of the demesnes, he shall not pay any tithes for the mill, but the modus given for the demesnes shall go in discharge of this also which is built on the land discharged:

1784. charged : that in 1 *Ro. Abr.* 652. pl. 4. 2 *Inst.* 490. if a man be seised of eight acres of pasture and of meadow, for the tithes of which there has been paid time out of memory 5 s. 6 d. and after the owner erects thereupon a corn-mill, he shall pay no tithe for the corn-mill, because the land was discharged *per modum decimandi*.

Eyre B. upon the first breaking of the case said, If this depended on the law, I should not have much difficulty to say that the later cases overthrow the old cases cited from *Ro. Abr.* there being no valid distinction between lands exempt, and lands covered by a modus, and the old cases having probably been decided upon a mistaken principle held at that time, that the tithe of mills was a predial tithe; but this depends upon the construction of a private act, which must be interpreted like a deed according to the true intent of the parties.

It appears from the Decree-book, that his Lordship afterwards in delivering the judgement of the court, declared, that the tithe of a mill though to be recovered in the nature of a *personal* tithe, is not to be taken strictly as a *personal* tithe, but is so far predial, and has so much reference to a certain place in which it arises, as in the particular case before the court, to fall within the description of a *small tithe*, for or in respect of an old inclosure for which a sum of money has been appointed to be paid by virtue of the act, and, as such, that it doth cease, determine, and is for ever extinguished.

The bill therefore was dismissed, but without costs, it being a new and doubtful question.

Tr. 24 Geo. III. A. D. 1784. Scac.

Edward Wills Carr v. George Heaton, William Chamberlayne, Anthony Chapman,

AND

Sir Thomas Fowke, George Heaton, Robert Peat, William Chamberlayne, Robert Peat, v. Edward Wills Carr. [Sir J. Skynner's MSS.]

LORD C. B.—The original bill is brought by the plaintiff, as vicar of *Lovesby* in the county of *Leicester*, against the defendants, as occupiers of lands within the parish, for an account of all small tithes from 28th of *June* 1775.

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The defendants admit, that the plaintiff is vicar, but they deny that he is entitled to the small tithes: for they say, that he is entitled only to a pension of 6 l. 13 s. 4 d. yearly, payable by the impropriator, who is entitled to all the tithes within the parish.

The cross-bill is brought by sir *Thomas Fowke*, as impropriator, and the other plaintiffs, who are occupiers, to establish the annual payment of 6 l. 13 s. 4 d. in full satisfaction of all small tithes. It was declared by the court at the hearing of the cause, that the exemption was insufficiently alleged in the cross-bill, and could not be established; and that the cross-bill must be dismissed. Which I mention here, to put that suit out of the question.

The vicar's claim is founded on an ancient endowment in the time of *H. 3.* or of king *John*, of which there is sufficient evidence by the instrument which has been produced, by which the vicar appears to have been endowed of all small tithes, "*de omnibus minutis decimis.*" In the reign of *C. 1.* the vicar instituted a suit in this court against the then impropriator and others, claiming all small tithes. The defendant in that suit insisted that the vicar was entitled only to an annual payment of 6 l. 13 s. 4 d. in the same manner as is alleged by the defendants in this cause. That cause proceeded to hearing, and the court declared (15 *Car. 1.*) the plaintiff to be entitled to all small tithes under the endowment, and established the right of the plaintiff and his successors to all the small tithes. Two subsequent orders were made (16 *Car.*) in that cause, carrying the decree into execution: the last of them declaring the plaintiff to be entitled to wool and lamb, as being small tithes.

There is evidence in the present cause, by one witness only, that about 1710 small tithes were received by a vicar from one farm in the parish. It is proved by the same witness that when the impropriator about 1725 determined a composition with an occupier, he demanded only tithe of *hay*: and another witness, whose father collected for the impropriator in the lordship of *Newton*, says, that no small tithes were paid to him in that district. The plaintiff has likewise given in evidence the survey of pope *Nicholas*, in which the church or rectory of *Lovesby* is valued at twenty-two marks; the vicarage of *Lovesby* at seven marks. There is likewise in evidence a terrier dated 1700, signed by the vicar (*Mr. Smith*) and two churchwardens, in which it is expressed, that there are belonging to the vicarage, "a house, a close, and all vicarial tithes, *sum toto altaragio.*" And there is a return from the

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the First-Fruits Office of the yearly value of the vicarage, 27 l. 5 s. 11 d.

This is the whole of the evidence on the part of the plaintiff.

For the defendants it was insisted, that the endowment had been varied at some time previous to the 16th of H. 8. and a pension of 6 l. 13 s. 4 d. granted to the vicar out of the rectory, which was appropriated to the hospital of *St. Lazarus de Burton*, and payable in lieu of the small tithes with which the vicar had been endowed. The survey from the First-Fruits Office taken in the 16th of H. 8. was read, in which the value of the rectory of *Lovesby* is 16 l. and then follows, under the article of outgoings, “*in pensionibus Gilberto Sturges vicario de Lovesby 6 l. 13 s. 4 d.*” And the valuation of the vicarage is “*in proficuis provenientibus de vicaria ibidem, tam in exitibus mansionis et cujusdam clausi, quam in pecuniis, communibus annis, 7 l. 1 s. 4 d.*” It appears, that the possessions of the hospital came to the crown in the 26th of H. 8. who in that year granted the rectory of *Lovesby*, among other possessions of the hospital, to lord *Lisle*, “*et decimas quasunque dictæ rectoriæ pertinentes*, as fully as the hospital had enjoyed them.” It reverted to the crown by the forfeiture of lord *Lisle*, and *Q. Mary* in the first year of her reign granted to *Fawnt* and *Chamberlayne*, the rectory, “*et decimas granorum, fœni, lanæ, et agnellorum, et omnes decimas quasunque.*” In this grant the grantees are discharged from all corodies and pensions; but there is an express exception “*of the pension of 6 l. 13 s. 4 d. annuatim solut vicario de Lovesby extra rectoriam de Lo. et eidem vicario et successoribus suis in dotatione assign.*” and 11 s. 0 $\frac{1}{4}$ d. for synodals to the archdeacon. In the second year of queen *Eliz.* an inquisition was taken on the death of *William Fawnt*, and, among other possessions, which descended to *William* his son, is stated the rectory of *Lovesby*, “*all tenths of corn, hay, lambs, wool, and other tenths in Lovesby, paying to the vicar of Lovesby 6 l. 13 s. 4 d.*” and synodals to the archdeacon. There is another inquisition in the 30th of *Eliz.* in which the rectory is stated in the same terms, and subject to the same pension of 6 l. 13 s. 4 d. There are two decrees in the court of wards made in the 34th and 36th years of *Eliz.* which, though they do not affect the rights of the present parties, yet shew that the vicar did not then receive all the small tithes. In the 45th of *Eliz.* there was a grant to *William Fawnt* of the rectory, with the same description of tithes, as in the grant of queen *Mary*, and with
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the same exception of the pension of 6 l. 13 s. 4 d. payable to the vicar out of the rectory. And there appear to have been several conveyances of the tithes arising on particular lands within the parish by the impropiator, or his trustees, in the same terms of description as in the former grant. The depositions in the cause in the time of C. 1. have been read, from which it appears, that the vicar had been used to receive 6 l. yearly, and some species of small tithes, not including wool and lamb, in the district of *Cold Newton*, which tithes so received did not exceed the yearly value of 13 s. 4 d. There is likewise evidence of his receiving certain allowances of hay and wood, and the pasturage of two cows, which were not in his endowment. And it is in proof, that the value of the tithe of wool and lamb was at that time worth 90 l. *per annum*; which, with the tithe of hay, and all the other tithes, except what had been received by the vicar in *Cold Newton*, had been received by the impropiator. It is in proof in the present case on the part of the defendants, that the vicar has not received any tithes; but that a sum of 13 l. *per annum* has been paid to him by the impropiator.

Upon this evidence the question is, Whether the plaintiff is entitled to an immediate decree for all small tithes? or, whether there should not be some further inquiry into his right? It has been urged by his counsel with great force of argument, that a decree made between the same parties, on the same point, not appealed from, but signed and enrolled, is conclusive; and that as the decree made in the time of C. 1. has been signed and enrolled, the rights of the parties to that suit, who are represented by the parties in the present suit, namely, the vicar and the impropiator, are bound by it; the merits of it cannot now be discussed; and, consequently, the plaintiff, the vicar, is entitled to the decree, which he prays by his bill.

The rule is founded in sound policy, which requires that the decrees of the court should not be contrary and opposite to each other on the same point of right; for instead of producing certainty and security, it would create the utmost confusion. But a decree, which is to have this conclusive effect, must be made between parties, who have a competent interest in the subject of it. The suit in which that decree was pronounced, was between the vicar and the impropiator, who was the patron. One of the parties had an absolute right; but the vicar, though he had the freehold of the vicarage, had no interest beyond his own incumbency. As vicar, he

A decree in favour of a vicar in a cause between him and the rector, will not be conclusive, though made upon the very point in question, if the ordinary were not a party to it.

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An endowment is not conclusive evidence of the vicar's rights: they may be narrowed or varied by subsequent usage.

he could do no act to bind the interests of his successors in the vicarage. Before the restraining acts he could not have affected those interests without the concurrence of the ordinary, as well as of the patron; and the same reason and policy requires that the ordinary should be a party to a suit, the end of which is to bind and conclude those interests which the law hath appointed him to watch over and protect. And though the decree which was pronounced was in favour of the vicar's claim, yet, if there were not parties sufficient to sustain the suit, the decree pronounced in favour of the vicar can be no more conclusive, than if it had been to the prejudice of his claim. Considering the decree in this light, it has no more force in respect to the successors of the vicar, who was party to it, than a decree for an account of the tithes would have had. The conduct of the parties to the suit, or of their representatives, shews, that they considered the decree as not conclusive; and that they might at their pleasure depart from it. The decree seems to have been founded on the sole evidence of the endowment; and on a supposition that the endowment was conclusive evidence of the vicar's right. For though it appeared by the survey of *H. 8* that the vicar was, at the time of making that survey, entitled only to a house, a close, and a pension of 6 l. 13 s. 4 d. and that the rectory had been frequently after granted by the crown with all tithes great and small, and with a reservation of 6 l. 13 s. 4 d. to the vicar; and though it was proved that the vicar, in fact, had not received all the small tithes, but only certain species of small tithes in a particular district of the parish, not exceeding in value 13 s. 4 d. with the yearly sum of 6 l.; yet the court, either supposing that the endowment could not have been varied, or that there was not sufficient evidence of any variation of it, instead of referring to a trial by jury a question of a mere legal right, which depended upon facts, decreed immediately in favour of the vicar, and established the right of him and his successors. But it does not appear, that the successors of the vicar have enjoyed the benefit of this decree; by taking the small tithes (the case of one farm only excepted, on which it is proved by one witness that tithe was taken); nor does it appear on the other hand, that they have ever submitted to receive the pension of 6 l. 13 s. 4 d. A different payment of 13 l. *per annum* has been made to them: a payment far too small to be a fair composition for the tithes, to which they were entitled by the decree, if the decree was binding; for it was proved, that at the time of making that decree,

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the tithe of wool and lamb only amounted in value to 90*l. per annum*. The natural inference from this conduct is, that the parties, or their representatives, after the pronouncing of the decree, compromised their rights; the one, not appealing from the decree; the other, not insisting upon the benefit of it; but both parties agreeing to substitute a money payment in lieu of the vicar's claim; greater than the pension which had been received, but infinitely smaller than the real value of the tithes; which must, since that time, have been continually increasing. If the vicar renounces the agreement, as he certainly may, it is just that the other party should not be so concluded by the decree, as to prevent all inquiry into the vicar's title. That inquiry can only be made by an issue directed to be tried by a jury: an inquiry which has never yet been made in that manner.

The proper issue to be tried is, Whether the plaintiff is entitled to all small tithes within the parish of *Lusely*? which issue the court thinks proper to direct; and to dismiss the cross-bill with costs.

The cause, on the petition of the vicar, came on to be re-heard on the 24th of *January* 1786; but it was ordered to stand over, with liberty to the plaintiff to amend his petition, and to add the impropiator as a defendant to his bill; and both the petition and the bill were amended accordingly. 4 W. 2's
Decr.

The amended bill stated, that the impropiator pretended to be entitled to all tithes whatsoever great and small within the parish; and that the vicar was entitled only to a yearly pension of twenty nobles, or 6*l.* 13*s.* 4*d.* for serving the cure; and charged, that the vicar was by virtue of the endowment entitled to all small tithes in the parish; and that his title thereto fully appeared from divers deeds, papers, and writings in the impropiator's custody or power, and particularly from a deed without a date made by *Hugh* bishop of *Lincoln*, and *William*, then dean, and the chapter of *Lincoln*, to the master and brethren of the hospital of *Burton St. Lazarus* in the said county; a grant or impropriation made by *William Faunt*, heretofore owner of the said rectory impropriate; and divers other grants, deeds, and instruments concerning the said rectory and vicarage, and the tithes belonging thereto respectively; but that he refused to produce the same.

The impropiator denied, that the vicar was entitled by endowment, prescription, or usage, to any of the small tithes, or that they had ever been paid to him or received by any former vicar;

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and insisted, that the vicarage was never endowed with any tithes, or with a mansion-house together with the glebe lands, but that the plaintiff was entitled only to a certain annual pension, salary, or sum of 6l. 13s. 4d. for the maintenance and support of the vicar of the said parish, being payable yearly by him as the owner of the said impropriate rectory. He also insisted, that in case any such endowment had been made, it had been long since void and annulled either by the disapprobation of the vicarage or otherwise as before stated; and that he was entitled to the tithes both great and small; and he denied that he had in his custody or power any deeds, instruments, or writings, or copies of or extracts therefrom concerning the said rectory and vicarage, and the endowment thereof, except such as were produced on behalf of the defendants in this cause at the original hearing.

Upon the re-hearing the court affirmed the former decree.

The vicar thereupon appealed from these decrees to the House of Lords; but the House dismissed the appeal, and affirmed the decrees. I have not inserted the reasons alleged in the printed cases for that appeal, because there seems to have been no foundation for it. So well satisfied indeed with the decision was Sir *J. Mitford*, the vicar's counsel on the re-hearing, that, as he declared in his argument in the case of *Garnons v. Barnard*, he refused to sign the case.

END OF VOLUME THE THIRD.







